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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

MAURICE RIVERS AND ROBERT C. DAVISON,

Petitioners

v.

ROADWAY EXPRESS, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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PETITION FOR A WRIT OF CERTIORARI

ERIC SCHNAPPER
UNIVERSITY OF WASHINGTON
SCHOOL OF LAW
1100 N.E. Campus Way
Seattle, WA 98195
(206) 616-3167

ELLIS BOAL
925 Ford Building
Detroit, MI 48226
(313) 962-2770

ELAINE R. JONES
DIRECTOR-COUNSEL

THEODORE M. SHAW
NORMAN J. CHACHKIN
CHARLES STEPHEN RALSTON
(Counsel of Record)
NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC.
99 Hudson Street
Sixteenth Floor
New York, New York 10013
(212) 219-1900

Attorneys for Petitioners

PRESS OF BYRON S. ADAMS ✦ WASHINGTON, D.C. ✦ 1-800-347-8208

107 pp

QUESTIONS PRESENTED

1. Where a black plaintiff alleges that he was dismissed discriminatorily in retaliation for having successfully enforced a contractual right to grieve disciplinary action, is he required, in order to establish a *prima facie* case, or demonstrate the pretextuality of his employer's proffered justifications, to identify a non-dismissed white employee whose position, situation, and work history were "nearly identical" to his own?

2. Where a plaintiff who has successfully enforced his contractual rights under a collective bargaining agreement on the ground, *inter alia*, that he was disciplined discriminatorily because of his race, alleges that his employer thereafter retaliated against him because of that successful enforcement, was it error to grant summary judgment against the plaintiff on the ground that no specific contract right was identified as precipitating the retaliation?

PARTIES

All of the parties are listed in the caption.

TABLE OF CONTENTS

Questions Presented i

Parties ii

Table of Authorities 1

OPINIONS BELOW 1

JURISDICTION 2

STATUTE INVOLVED 2

STATEMENT OF THE CASE 2

A. Proceedings Below. 2
1. The Earlier Litigation. 2
2. The Current Proceedings. 5
3. The Ruling Below. 7

B. Statement of Facts. 8

REASONS FOR GRANTING THE WRIT 14

I. CERTIORARI SHOULD BE GRANTED TO CLARIFY THE STANDARD FOR PROVING INTENTIONAL DISCRIMINATION IN THE DISMISSAL OF AN EMPLOYEE. 14

A. The Decision Below is in Conflict with Decisions in Numerous Other Circuits. 14

B. The Decision Below Is In Conflict With Decisions of This Court. 23

II. CERTIORARI SHOULD BE GRANTED TO CORRECT A FUNDAMENTAL MISINTERPRETATION OF THE ANTI-RETALIATION PROTECTIONS OF 42 U.S.C. § 1981 29

CONCLUSION 30

APPENDIX

TABLE OF AUTHORITIES

Cases: *Pages:*

Ahmed v. N.C. Servo Technology, Corp.,
1996 U.S. Dist. LEXIS 6621 (E.D. Mich. 1996) 25

Brown v. Parker-Hannifin Corp.,
746 F.2d 1407 (10th Cir. 1984) 22

Bryer v. Hubert Distributors, Inc.,
1991 U.S. Dist. LEXIS 14370 (E.D. Mich. May 13, 1991) 25

Burns v. AAF-McQuay Inc.,
96 F.3d 728 (4th Cir. 1996) 19

Burrell v. Providence Hosp.,
104 F.3d 361, 1997 WL 729281 (6th Cir. 1996) 26

Butler v. Ohio Power Co.,
91 F.3d 143, 1996 WL 400179 (6th Cir. 1996) 26

Cassino v. Reichhold Chemicals, Inc.,
817 F.2d 1338 (9th Cir. 1987) 17

Chambers v. TRM Copy Centers Corp.,
43 F.3d 29 (2d Cir. 1994) 19

Cooper v. City of North Olmsted,
795 F.2d 1265 (6th Cir. 1986) 16

Crum v. American Airlines, Inc.,
946 F.2d 423 (5th Cir. 1991) 19

Denisi v. Dominick's Finer Foods, Inc.,
99 F.3d 860 (7th Cir. 1996) 17

EEOC v. Metal Service Co.,
892 F.2d 341 (3d Cir. 1990) 19

Pages

Fuka v. Thomson Consumer Electronics,
82 F.3d 1397 (7th Cir. 1995) 18, 19

Furnco Construction Corp. v. Waters,
438 U.S. 567 (1978) ..... *passim*

Gallo v. Prudential Services,
22 F.3d 1219 (2nd Cir. 1994) 25

Gerth v. Sears, Roebuck & Co.,
94 F.3d 644, 1996 WL 464984 (6th Cir. 1996) 26

Goldman v. First National Bank of Boston,
985 F.2d 1113 (1st Cir. 1993) 18

Hale v. Secretary, Dept. of Treasury,
86 F.3d 1156, 1996 WL 279880 (6th Cir. 1996) . 26

Hargett v. National Westminster Bank, USA,
78 F.3d 836 (2d 1996) 19

Harrison v. Metro Government of Nashville,
80 F.3d 1107 (6th Cir. 1996) 16

Harvis v. Roadway Express, Inc.,
923 F.2d 59 (6th Cir. 1991) 3

Harvis v. Roadway Express, Inc.,
973 F.2d 490 (6th Cir. 1992) 2, 4, 5

Hawkins v. The Ceco Corp,
883 F.2d 977 (11th Cir. 1989) 17

Henry v. Daytop Village,
42 F.3d 89 (2d Cir. 1994) 25

Jackson v. Ford Dealer Computer Services, Inc.,
95 F.3d 1152, 1996 WL 483028 (6th Cir. 1996) 26

Pages

Jobe v. Hardaway Management Co., Inc.,
98 F.3d 1342, 1996 WL 577638 (6th Cir. 1996) 26

Josey v. John R. Hollingsworth Corp.,
996 F.2d 632 (3d Cir. 1993) 18, 19

Kocsis v. Multi-Care Management,
97 F.3d 876 (6th Cir. 1996) 26

LaPointe v. United Autoworkers Local 600,
103 F.3d 485 (6th Cir. 1996) 25

Laughlin v. United Telephone-Southeast, Inc.,
107 F.3d 871, 1997 WL 52921 (6th Cir. 1997) 25

Lawrence v. Mars, Inc.,
955 F.2d 902 (4th Cir. 1992) 19

Lawrence v. National Westminster Bank New Jersey,
98 F.3d 61 (3d Cir. 1996) 17, 19

Leffel v. Valley Financial Services,
1997 U.S. App. LEXIS 11359 (7th Cir. 1997) 20,22

Lindsey v. Prive Corp.,
987 F.2d 324 (5th Cir. 1993) 19

Lytle v. Household Mfg., Inc.,
494 U.S. 545 (1990) 5, 7

Marhtel v. Bridgestone/Firestone, Inc.,
926 F. Supp. 1293 (M.D. Tenn. 1996) 25

Mayberry v. Vought Aircraft Co.,
55 F.3d 1086 (5th Cir. 1995) 19

McDonnell Douglas Corp. v. Green,
411 U.S. 792 (1973) ..... *passim*

Pages

Mitchell v. Ball,
33 F.3d 450 (4th Cir. 1994) 19

Mitchell v. Toledo Hospital,
964 F.2d 577 (6th Cir. 1992) 16, 17

Mitchell v. White Castle Systems, Inc.,
86 F.3d 1156, 1996 WL 279863 (6th Cir. 1996) 26

Mulero-Rodriguez v. Ponte, Inc.,
98 F.2d 670 (1st Cir. 1996) 18

Nesbit v. Pepsico, Inc.,
994 F.2d 703 (9th Cir. 1993) 17

Noble v. Alabama Department of Env. Mgt.,
872 F.2d 361 (11th Cir. 1989) 17

O'Connor v. Consolidated Coin Caterers Corporation,
517 U.S. ___, 134 L. Ed. 2d 433 (1996) .... *passim*

Palmer v. Health Care and Retirement, Inc., 1997 WL
135451 (6th Cir. 1997) 25

Palmer v. United States,
794 F.2d 534 (9th Cir. 1986) 17

Patterson v. McLean Credit Union,
491 U.S. 164 (1989) 3, 4, 24

Perkins v. Regents of the University of Michigan,
934 F. Supp. 857 (S.D. Mich. 1996) 25

Plair v. E.J. Brach & Sons,
105 F.3d 343 (7th Cir. 1997) 19

Quaratino v. Tiffany & Co.,
71 F.3d 58 (2d Cir. 1995) 19

Pages

Reynolds v. School District No. 1 Denver, Colorado, 69 F.3d 1523 (10th Cir. 1995) 20

Rivers v. Roadway Express, 511 U.S. ___, 128 L. Ed. 2d 274 (1994) 2, 5

Robinson v. Shell Oil, 519 U.S. ___, 136 L. Ed. 2d 808 (1997) 14

Rothmeier v. Investment Advisers, Inc., 85 F.3d 1328 (8th Cir. 1996) 20

Rowls v. Runyon, 100 F.3d 957, 1996 WL 627712 (6th Cir. 1996) 26

Ruth v. Children's Medical Center, 940 F.2d 662, 1991 WL 151158 (6th Cir. Aug. 8, 1991) 16

Serrano-Cruz v. DFI Puerto Rico, Inc., 109 F.3d 23 (1st Cir. 1996) 18

Shelmon-Murchison v. Gerber Products Company, 1996 U.S. Dist. LEXIS 20735 (S.D. Mich. Sept. 13, 1996) 25

Sinclair v. ATE Management & Service Company, Inc., 1996 U.S. Dist. LEXIS 19921 (E.D. Mich. Nov. 27, 1996) 25

Singh v. Shoney's, Inc., 64 F.3d 217 (5th Cir. 1995) 19

Smith v. F.W. Morse & Co., Inc., 76 F.3d 413 (1st Cir. 1996) 18

Smith v. Stratus Computer, Inc., 40 F.3d 11 (1st Cir. 1994) 18

Pages

St. Mary's Honor Center v. Hicks,
509 U.S. 502, 125 L. Ed. 2d 407 (1993) . . . . *passim*

Steele v. Electronic Data Systems Corp.,
103 F.3d 131, 1996 WL 690142 (6th Cir. 1996) 26

Steward v. BASF Corporation,
1994 U.S. Dist. LEXIS 10261 (W.D. Mich. June 7, 1994) 25

Stotts v. Memphis Fire Dept.,
858 F.2d 289 (6th Cir. 1988) 16, 17

Suggs v. Servicemaster Education Food Management,
72 F.3d 1228 (6th Cir. 1996) 16

Sutera v. Schering Corp.,
73 F.3d 13 (2d Cir. 1995) 19

Terwilliger v. GMRI, Inc.,
952 F. Supp. 1224 (E.D. Mich. 1997) 25

Texas Dept. of Community Affairs v. Burdine,
450 U.S. 248 (1981) . . . . . *passim*

Thomas v. Hoyt, Brumm & Link, Inc.,
910 F. Supp. 1280 (E.D. Mich. 1994) 25

Timms v. Frank,
953 F.2d 281 (6th Cir. 1992) 16, 17

Toyee v. Janet Reno,
940 F. Supp. 1081 (E.D. Mich. 1991) 25

Trujillo v. Grand Junction Regional Center,
928 F.2d 973 (10th Cir. 1991) 20

Pages

United States Postal Service Board of Governors v. Aikens, 460 U.S. 711 (1983) 23, 28

Walker v. Runyon, 99 F.3d 1140, 1996 WL 607197 (6th Cir. 1996) 26

Wallis v. J.R. Simplot Co., 26 F.3d 885 (9th Cir. 1994) 17

Wathen v. Lexmark Intern, Inc., 99 F.3d 1140, 1996 WL 622955 (6th Cir. 1996) 26

Weisbrot v. Medical College of Wisconsin, 79 F.3d 677 (7th Cir. 1996) 18

Weldon v. Kraft, Inc., 896 F.2d 793 (3d Cir. 1990) 18

White v. United Autoworkers Local 600, 103 F.3d 485 (6th Cir. 1996) 25

Wilson v. National Car Rental System, Inc., 94 F.3d 646, 1996 WL 452882 (6th Cir. 1996) 26

Wilson v. Wells Aluminum Corp., 107 F.3d 12, 1997 WL 87218 (6th Cir. 1997) .. 25

Statutes: *Pages:*

Age Discrimination in Employment Act 15

Americans with Disabilities Act 15

Civil Rights Act of 1866, 42 U.S.C. § 1981 ..... *passim*

Pages

Civil Rights Act of 1964,
42 U.S.C. § 2000e et seq 3, 15

Labor-Management Relations Act, 29 U.S.C. § 185(a) 3

28 U.S.C. § 1254(1) 2

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, Maurice Rivers and Robert C. Davison, respectfully pray that a writ of certiorari issue to review the judgment of the Court of Appeals for the Sixth Circuit entered in this proceeding on April 10, 1997.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is unreported and is set out at pages 1a-9a of the Appendix hereto ("App."). The Opinion and Order of the United States Court District Court for the Northern District of Ohio, Western Division, dated May 25, 1995, is unreported and is set out in the Appendix at pages 10a-26a. The Order of the district court denying petitioners' motion for reconsideration, dated September 22, 1995, is also unreported and is set out in the Appendix at pages 27a-28a.

Earlier decisions in this case that are relevant to the issues raised in the current Petition are set out in the Appendix as follows: Memorandum and Order of the district court dated November 30, 1988, App. at 29a-37a; Memorandum and Order of the district court dated January 9, 1990, App. at 38a-43a; Findings of Fact and Conclusions of Law of the district court dated October 18, 1990, App. at 44a-54a. The earlier decision of the Court of Appeals is reported *sub nom. Harvis v. Roadway Express, Inc.*, 973 F.2d 490 (6th Cir. 1992) and is set out in the Appendix at 55a-70a. In addition, the prior decision of this Court is reported at 511 U.S. ___, 128 L.Ed. 2d 274 (1994).

JURISDICTION

The decision of the Sixth circuit was entered April 10, 1997. This Court has jurisdiction to hear this case pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

This case involves 42 U.S.C. § 1981, which provides, in pertinent part:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

STATEMENT OF THE CASE

A. Proceedings Below.

1. The Earlier Litigation.

Maurice Rivers and Robert C. Davison, together with a third co-plaintiff James T. Harvis, Jr.,[1] filed their Complaint against respondent, Roadway Express, Inc., their former employer, on February 22, 1987, in the United States District Court for the Northern district of Ohio, Western Division, alleging that Roadway discharged them in violation of the Civil Rights Act of 1866, 42 U.S.C. § 1981. They also asserted claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, and under § 301 of the Labor-Management Relations Act, 29 U.S.C. § 185(a). Petitioners also raised a hybrid §301/duty of fair representation claim against their Union, Local Union 20, International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America. Petitioners filed a First Amended Complaint dated September 28, 1987.

The district court entered final judgments on all claims of each plaintiff. Only the § 1981 claim of Rivers and Davison that they were discriminatorily discharged in retaliation for seeking to enforce their contractual rights is at issue here.

The parties engaged in extensive discovery over several months under the law as it stood prior to *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989). Both Roadway and the Union moved for summary judgment. The district court dismissed petitioners' claims that the Union violated its duty of fair representation, and also dismissed petitioners' related labor law claims against Roadway. App.

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[1]Harvis was a co-plaintiff, but his case was severed from that of Rivers and Davison and tried separately. His claims are not at issue here. *See Harvis v. Roadway Express, Inc.*, 923 F.2d 59 (6th Cir. 1991).

30a-38a. The district court denied Roadway judgment, however, on petitioners' race discrimination claims under Title VII and § 1981, determining that "genuine issues of material fact exist as to plaintiffs' claims under Section 1981 and Title VII against defendant Company." App. 37a.

Petitioners' case was awaiting trial when this Court handed down its decision in *Patterson v. McLean Credit Union, supra*. The district court, by Order dated July 10, 1989, directed Rivers and Davison to show cause why their § 1981 claims should not be dismissed in light of *Patterson*. Subsequently, the district court dismissed petitioners' § 1981 claims. App. 39a-44a. Petitioners' Title VII claims were tried to the district court without a jury, and he found against petitioners in all respects. App. 45a-55a.

Petitioners appealed to the Sixth Circuit solely from the dismissal of their claims under § 1981. At issue was whether *Patterson* eliminated claims that an employee had been discharged discriminatorily for seeking to enforce his right under an employment contract to grieve an adverse action. However, during the pendency of the appeal, Congress passed the Civil Rights Act of 1991, which overturned *Patterson* in its entirety. Petitioners filed a supplemental brief arguing that the new statute should be applied to this action and that, therefore, all of their section 1981 claims, including the claim that their discharge was motivated by racial discrimination, should be reinstated and the case remanded for a jury trial.

On August 24, 1992, the court of appeals affirmed in part and reversed in part. *Harvis v. Roadway Express, Inc.*. 973 F.2d 490 (6th Cir. 1992); App. 56a-71a. It held that racially motivated discharge claims, as such, did not survive *Patterson*. It also held that the 1991 Act should not be applied to cases pending at the time of its enactment and that, conversely, *Patterson* should be applied to cases that arose before the date of that decision.

The court also held, however, that petitioners' claim

that they had been discharged discriminatorily because they had sought to enforce their employment contract by grieving adverse actions against them was still covered by section 1981 after *Patterson*—and that, therefore, the district court erred in dismissing that aspect of petitioners' claims under section 1981. The case was remanded for further proceedings under section 1981, including a trial by jury as guaranteed by the Seventh Amendment, citing *Lytle v. Household Mfg., Inc.*, 494 U.S. 545 (1990). *Harvis v. Roadway Express*, 973 F.2d at 495; App. 61a-65a.

Petitioners successfully petitioned this Court for a writ of certiorari on the issue of the application of the Civil Rights Act of 1991 to this case. However, the Court held that the 1991 Act did not apply, and remanded the case for further proceedings. *Rivers v. Roadway Express, Inc.*, 511 U.S. ___, 128 L.Ed. 2d 274 (1994). The Sixth Circuit remanded the case to the district court for further proceedings in conformity with its prior mandate.

2. The Current Proceedings.

On remand, no jury trial was in fact held. Rather, respondent, Roadway Express, filed a second motion for summary judgment in which it relied on the findings of fact of the district court rendered after the bench trial on petitioners' Title VII claims, together with other citations to pleadings and discovery developed before *that* trial, and the trial transcript.

Petitioners opposed the motion, relying on matters in the record that they claimed established that there were disputed issues of material fact. They also reiterated their demand for a jury trial.

The district court granted the motion for summary judgment by applying the *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) evidentiary analysis. The court held that it was necessary for the petitioners to establish four elements in order to make out a *prima facie* case:

1) plaintiff is a non-white;

2) plaintiff enforced or exercised a specific contract right;

3) plaintiff was subject to an adverse employment action;

4) there is a causal link between *both* plaintiff's enforcement or exercise of the contract right and plaintiff's race.

App. 18a. The court then held that petitioners had established the first and third elements, since they are both African Americans and they were discharged. With regard to the second element, however, the district court held that there was no evidence that there was a contractual right to notice of a hearing by certified mail. It further rejected petitioners' argument that they were enforcing their conceded contractual right to grieve differences with their employer that arose out of the collective bargaining agreement, on the ground that this claim had been raised for the first time during the oral argument on the defendant's motion for summary judgment. *Id.*, 23a.

With regard to the fourth element, the court held that there was sufficient evidence to establish a retaliatory motive for the adverse action since it occurred seventy-two hours after petitioners had successfully grieved the two-day suspension. *Id.*, 24a-25a. However, the court further held that the petitioners "present[ed] no evidence of any comparables that could possibly raise an inference of a racial motivation in the alleged retaliation," and that they had also failed to present any direct evidence of a racial motivation for the actions of the employer. *Id.*, 25a. Therefore, the court held, petitioners had failed to establish a *prima facie* case of retaliatory contract impairment under § 1981.

The district court went on to hold that even if it were assumed that a *prima facie* case had been established, the company had come forward with evidence of a legitimate,

nondiscriminatory reason for their discharges, viz, "their accumulated work records and because they disobeyed direct orders to attend their second [post-grievance] set of disciplinary hearings on September 26." *Id.*, 26a. The court said that petitioners had come forward with no evidence which "would support a jury finding that the proffered, non-discriminatory reasons for petitioners' discharges were a pretext to cover defendant's retaliatory and racial motivation . . . ." *Id.*, 27a. Therefore, the defendant was entitled to judgment as a matter of law.

The district court denied the motion for reconsideration filed by the petitioners on the grounds that it asserted new contractual right theories and facts that were not previously offered in opposition to the motion for summary judgment and, therefore, it did not provide a proper basis for reconsideration of the summary judgment order.

3. The Ruling Below.

The petitioners appealed to the Sixth Circuit, claiming that the grant of summary judgment denied them their right to a jury trial under the seventh amendment and this Court's decision in *Lytle*, since there were substantial and material matters of fact that were in dispute. The majority of the court of appeals panel affirmed, holding, *inter alia*, that the petitioners had failed to demonstrate that comparable white employees had been treated differently and had failed to establish that they had been denied a right established by the collective bargaining agreement. It also held that even if a *prima facie* case of discrimination through a retaliatory discharge had been established, the respondent had come forward with a legitimate, nondiscriminatory reason for discharging the petitioners, viz., their disobedience of a direct order to attend the second disciplinary hearings and their accumulated work records. Finally, the court of appeals held that no pretext had been shown since a white employee had also been discharged for refusing a direct order to attend his disciplinary hearing.

App., 1a-6a. Judge Merritt dissented on the ground that summary judgment should not have been granted because the petitioners had clearly introduced evidence that they had been retaliated against because they sought to exercise their contractual right to grieve the earlier discharge, and that there was ample evidence from which a jury could infer a racially discriminatory motive in their discharge. App. 6a-10a.

B. Statement of Facts.

Since this case involves the grant of summary judgment, the facts are set out herein in the light most favorable to the non-moving party, the petitioners.

Roadway hired plaintiff Robert Davison to work as a washer in its Akron facility in 1972 and hired Maurice Rivers the following year to work as a janitor at the same facility.[2] Each worked his way up to become a mechanic. In 1975, both were transferred to work as mechanics in Roadway's garage in Toledo, Ohio. For 10 years, both worked capably in that job.[3]

On August 22, 1986,[4] Roadway required both Rivers and Davison to attend disciplinary hearings on their

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[2] R. 192: Appendix I of Plaintiff in Opposition to [First Motion for] Summary Judgment, ("Appendix I") Davison Dep. 7/15/87, at 44-45; Rivers Dep. 6/16/87 at 11. Citations are to the record in the court of appeals.

[3] R. 192: Appendix I, Thompson Dep. 7/22/87, at 49-50.

[4] There were only four African-American employees working in the Toledo garage in 1986: plaintiffs Rivers, Davison and Harvis, and an African-American union steward, Eugene T. McCord, who had been discharged in 1984 for refusing to have his picture taken in circumstances an arbitrator described as showing a "callous disregard for the personal rights of minority employees." R. 345: Second Affidavit of Eugene T. McCord, p. 3. Mr. McCord was reinstated.

accumulated work record without proper notice.[5] Roadway's practice in disciplinary cases was to request a mutually agreeable hearing date with the union for a disciplinary hearing. The company would then notify the employee and the union of the hearing date. The employee's notice would come by certified or registered mail.[6] Rivers and Davison were not given such notice, however. Davison was simply called into the office at the end of his shift without any prior notice, verbal or written, that a hearing would be held that day. He protested that he had not received proper notice.[7] Rivers' foreman verbally informed him during the early hours of August 22 that a disciplinary hearing would be held for him later that morning. Rivers also received no written notice.[8]

Because Rivers and Davison had not received proper notice, neither of them attended the disciplinary hearings. Roadway Express proceeded despite their absence. At the conclusion of the hearings, Roadway suspended each employee for two days for minor infractions, such as "wasting time" and wearing improper shoes to work.

Both employees then filed grievances challenging their suspensions. The grievances were heard by the Toledo Local Joint Grievance Committee (TLJGC) on September 23, 1986.[9] The TLJGC was comprised of six members, three each from union and management, including co-chairs.

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[5]R. 192: Appendix I, Guy Dep. 8/12/87, at 151; R. 218: Complaint, at ¶ 11.

[6]R. 345, Second McCord Affidavit, p. 2.

[7]R. 192: Appendix I, Davison Dep. 7/20/87, at 187-192; Guy Dep. 8/12/87, at 148.

[8]R. 192: Appendix I, Rivers Dep. 7/14/87, at 297-299; Guy Dep. 8/12/87, at 149.

[9] R. 192: Appendix I, Rivers Dep. 7/14/87, at 316, 318.

Rivers and Davison were represented by Mr. McCord, who was chief steward at the time, and by the Union business agent, Paul Toney.[10] They contended that the Company failed to give proper notice and instead discriminatorily held prompt hearings for these African-American employees but not for whites.[11] As Mr. McCord stated:

> Between us Toney and I made three arguments. One was that the company had rushed disciplinary hearings on plaintiffs ahead of white employees. I said this was discrimination and gave specific examples.[12]
>
> * * *
>
> A second argument I made to the TLJGC was that plaintiffs had been given improper notice of their hearings August 22. Again, no specific clause in the contract provides for any certain type or manner of notice of disciplinary hearings. but the grievance

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[10]R. 345, Second McCord Affidavit, p. 2-3.

[11]R. 192: Appendix I, Rivers Dep. 7/14/87 at 321-22, 324; McCord Dep. 9/3/87, at 285-86, 293; R. 345, Second McCord Affidavit, p. 3.

[12]*See also*, R. 192: Appendix I, Rivers Dep. 7/14/87 at 321-22, 324; McCord Dep. 9/3/87, at 285-86, 293, explaining how they presented examples of white employees who were not hastily brought in for hearings as they had been, notwithstanding that Roadway's requests that the union agree to dates for hearings on their disciplinary records had been pending for months. Thus, the time between the request for hearings of the charges against Rivers and Davison were 22 and 39 days respectively, while the time between the request and the hearing of the eleven white employees for whom hearings were held during 1986 and early 1987 averaged 99 days, with only one white employee having a more prompt hearing than both plaintiffs, and one other more prompt than Davison. R. 192: Appendix II, Plaintiffs' Exs. 64, 65, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, and 81.

> procedure covered "any difference or dispute." That included past practices. Notice had always been given in the past by certified or registered mail to employee mechanics. It was a past practice. They had come to rely on it and they had the right to rely on it.
>
> * * *
>
> Finally, Paul Toney and I both said that the suspensions were without "just cause."[13]

The TLJGC ruled in petitioners' favor, determining that "[b]ased on improprieties the claim of the union is upheld."[14] The committee reversed the suspensions and awarded petitioners-appellants back pay for the two days they were suspended.

Roadway Labor Relations Manager James O'Neill became enraged upon hearing of the TLGC determination, and vowed to hold hearings on petitioners again with 72 hours. O'Neill was "hollering" and was visibly upset.[15]

Roadway did in fact convene disciplinary hearings on Davison and Rivers again within three days of the September 23, 1986, TLJGC decision. Roadway also scheduled hearings on three white employees specifically because of Mr. McCord's having argued that there had been racial discrimination against Rivers and Davison because white employees had not been called for hearings even though their alleged offenses pre-dated those of Rivers and Davison. Thus, Mr. O'Neill testified:

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[13]R. 345, Second McCord Affidavit, pp. 3-4.

[14]R. 192: Appendix II, Plaintiffs' Ex. 113, 114; R. 345, Second McCord Affidavit, p. 4.

[15]R. 192: Appendix I, McCord Dep. 9/3/87 at 286; Rivers 7/14/87 Dep. at 327; Guy Dep. 8/12/87 at 168-69.

Q. And you are having these hearings [on the charges against three white employees] because you claim that Mr. McCord requested them?

A. Yes.

Q. Based on his argument of race discrimination back in September 23?

A. Yes.[16]

With regard to the second round of hearings, Roadway attempted to notify petitioners of the hearings by leaving papers at their workstations. This notice, it was claimed, also fell short of the standard procedure of sending the notice by certified mail, which petitioners believed was required.[17] Davison and Rivers went to the hearing room, but objected to the lack of notice and again declined to remain. Again the hearings were held in their absence. The second disciplinary hearings were conducted by another member of Roadway management, Robert Kresge, but O'Neill also personally attended.[18] As a result of the hearings, petitioners were discharged on September 26, 1986.

Petitioners each claimed that no one informed them

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[16]R. 327: Testimony of James O'Neill, Transcript of Trial, Vol. II, pp. 524, 531. The conclusion that white employees were included in the disciplinary actions so that the company would be able to discharge petitioners in retaliation for having exercised their contractual rights was supported by the testimony of another white employee, Mr. Russell, noted by Judge Merritt in dissent below. Russell was also fired for violating a direct order but was reinstated. He was told by a supervisor that he was fired so that "Roadway would have a defense . . . that they don't only fire black people . . ." App. 9a.

[17]R. 192: Appendix I, Rivers Dep. 7/14/87, at 339-40, 347, 378-9; Toney Dep. 10/1/87, at 19-20.

[18]R. 192: Appendix I, O'Neill Dep. 8/13/87, at 63, 69.

that failure to attend the second disciplinary hearing would cause his discharge.[19] The Company, on the other hand, asserted that the employees' failure to attend the hearings in disobedience of what it characterized as a "direct order" was the basis for its decision immediately to discharge them (even though it had *not* discharged the petitioners when they refused to attend the hearings held before their successful grievance).

With regard to the three white employees who received disciplinary hearings on the same day because the union steward raised the issue of racial discrimination, one, Mr. Sedelbauer, also refused several orders to attend his hearing and was discharged.[20] A second white employee, Mr. Bradley, had the day of the hearing off. He was neither on the clock nor was he ordered to attend the hearing. Nevertheless, the hearing was held in his absence and he was given a two-day suspension. The third white employee, Mr. Swartzfager,[21] was on the clock but obeyed the order to attend the hearing. He was suspended for two days. App. 27a.

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[19]*See, e.g.*, R. 192: Appendix I, Davison Dep. 7/20/87, at 227, 232; Davison Dep. 8/20/87.

[20]Petitioners argued that Mr. Sedelbauer's circumstances were different in that he did not attend the disciplinary hearing at all, while petitioners did but left before the hearings were concluded.

[21]There had been a six-month delay between the alleged misconduct of this white employee and the scheduling of a hearing in response to McCord's argument at the petitioners' initial hearings.

REASONS FOR GRANTING THE WRIT

This case involves a claim of discrimination more egregious than presented in *Robinson v. Shell Oil*, 519 U.S. ___, 136 L.Ed. 2d 808 (1997). The petitioners allege that they were fired from long-standing employment with Roadway Express because they grieved, successfully, disciplinary charges on the ground that they had been subjected to different proceedings because of their race. After winning their grievance, new disciplinary hearings were set on short notice. Petitioners testified that they were not warned that they could be terminated if they did not attend the hearings; nevertheless, they were fired when they left. All petitioners have sought is a jury trial on the merits of their claims. They have been denied this right because of the mechanical application by the courts below of rules for establishing a *prima facie* case of discrimination and for proving the ultimate fact of discrimination.

I.

CERTIORARI SHOULD BE GRANTED TO CLARIFY THE STANDARD FOR PROVING INTENTIONAL DISCRIMINATION IN THE DISMISSAL OF AN EMPLOYEE.

A. The Decision Below is in Conflict with Decisions in Numerous Other Circuits.

Twenty-four years ago in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), this Court set out a paradigm for establishing a *prima facie* case of intentional discrimination in the hiring of employees. 411 U.S. at 802. For at least a decade, however, by far the largest number of civil actions filed under federal anti-discrimination statutes have concerned dismissals rather than initial hiring decisions. To this very large group of employment discrimination actions the *McDonnell Douglas* formulation, which expressly concerns "applications," cannot be applied as written. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253 n.6 (1981).

As a consequence, this Court noted in *O'Connor v. Consolidated Caterers Corporation*, 517 U.S. ___, 134 L.Ed.2d 433, 438 (1996), the circuit courts in age discrimination cases have "applied some *variant* of the basic evidentiary framework set forth in *McDonnell Douglas*." 134 L.Ed.2d at 438 (emphasis added). There are widespread differences among the lower courts as to how the *McDonnell Douglas* paradigm should be adapted to discriminatory discharge claims, not only under the Age Discrimination in Employment Act, but also under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 1981, the Americans with Disabilities Act, and other federal anti-discrimination laws. *O'Connor* resolved a comparatively narrow issue somewhat unique to ADEA claims, and merely assumed without deciding that the *McDonnell Douglas* paradigm for Title VII hiring claims could be adapted to an ADEA discharge claim. This case presents the broader, recurring issue of what basic standard should be applied to discharge claims brought under the various anti-discrimination statutes.[22]

The conflict and confusion among the courts of appeals is quite complex. As we set out below, there are five distinct standards in use in the lower courts. Several circuits, including the Sixth, have embraced one of these standards with a fair degree of consistency. In other circuits, the standard announced and applied varies from panel to panel with little rhyme or reason. Evidence deemed entirely adequate in some courts to support a finding of intentional discrimination is dismissed in other courts as insufficient even to establish a *prima facie* case. Whether particular claimants will receive a trial on the merits, or see their claims dismissed on summary judgment, often depends less on the evidence they adduce than on the circuit in which their claim was filed.

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[22]As described above, the specific claim in the present case is whether the petitioners were discriminated against by being discharged in retaliation for having sought to enforce their contractual rights free of racial discrimination, in violation of § 1981.

The courts of appeals generally require, to establish a *prima facie* case, that the plaintiff prove (1) that he or she was discharged,[23] (2) that he or she met the basic qualifications for the job in question, and (3) that he or she belonged to some group protected from discrimination by the statute involved. Disputes about whether a plaintiff meets these requirements arise only rarely. The critical issue is what additional elements, if any, the dismissed employee must establish to create a *prima facie* case. The five standards now in use in the courts of appeals are as follows:

Similarly Situated Comparator: The most restrictive rule, applied by the Sixth Circuit in this and previous cases, requires the plaintiff to identify an employee, outside the protected group, who (1) held the same position, (2) had the same work record, (3) reported to the same supervisor, and (4) was not discharged.[24] Sixth Circuit caselaw understandably characterizes this rule as mandating that the plaintiff find a "comparable" who is "similarly situated in all respects"[25]or "nearly identical."[26]Because of the stringency

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[23]This first element is more complex where the claim is that the plaintiff left employment because of intolerable discrimination, in other words, was "constructively discharged." The present case involves actual dismissal from employment.

[24]*Harrison v. Metro Government of Nashville*, 80 F.3d 1107, 1115 (6th Cir. 1996); *Pierce v. Commonwealth Life Ins. Co.*, 40 F.3d 796, 802 (6th Cir. 1994); *Mitchell v. Toledo Hospital*, 964 F.2d 577, 582-83 (6th Cir. 1992). A more general formulation of the "similarly situated" comparator requirement can be found in *Suggs v. Servicemaster Education Food Management*, 72 F.3d 1228 (6th Cir. 1996); *Timms v. Frank*, 953 F.2d 281, 186 (6th Cir. 1992); *Stotts v. Memphis Fire Dept.*, 858 F.2d 289, 296 (6th Cir. 1988); *Cooper v. City of North Olmsted*, 795 F.2d 1265, 1270 (6th Cir. 1986).

[25]*Harrison v. Metro Government of Nashville*, 80 F.3d at 1115 ("similarly situated *in all respects*")(emphasis in original); *Mitchell v. Toledo Hospital*, 964 F.2d at 583.

of this rule, discriminatory discharge claims are frequently dismissed in the Sixth Circuit because the employer has no such nearly identical comparator in its workforce.[27]

Replacement by Non-Group Member: The Eleventh Circuit requires that the plaintiff prove that he was replaced by a person who is not a member of the protected group. Although *O'Connor v. Consolidated Coin Caterers Corp., supra,* disapproved use of this standard in ADEA cases, the Eleventh Circuit also applies it in race discrimination cases.[28] This was the standard applied by the lower courts in *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 125 L.Ed.2d 407 (1993). Other appellate panels applying this approach to ADEA cases since *O'Connor* require proof that the plaintiff was replaced by a "younger" worker.[29] Both before and after *O'Connor* the Ninth Circuit has generally required in ADEA cases that the plaintiff show that he or she was replaced by a younger worker.[30]

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[26]*Pierce v. Commonwealth Life Ins. Co.*, 40 F.3d at 802; *Ruth v. Children's Medical Center*, 940 F.2d 662 (Table), 1991 WL 151158, at *6 (6th Cir. Aug. 8, 1991).

[27]*Pierce v. Commonwealth Life Ins. Co.*, 40 F.3d at 802; *Mitchell v. Toledo Hospital*, 964 F.2d at 584; *Timms v. Frank*, 953 F.2d at 287; *Stotts v. Memphis Fire Dept.*, 858 F.2d at 296-99 (reversing finding of intentional discrimination).

[28]*Hawkins v. The Ceco Corp*, 883 F.2d 977, 982 (11th Cir. 1989)(plaintiff "was replaced by one outside the protected class"); *Noble v. Alabama Department of Env. Mgt.*, 872 F.2d 361, 365 (11th Cir. 1989)("he was replaced by a member of the majority race").

[29]*Lawrence v. National Westminster Bank New Jersey*, 98 F.3d 61, 66 (3d Cir. 1996); *Denisi v. Dominick's Finer Foods, Inc.*, 99 F.3d 860, 864 (7th Cir. 1996).

[30]*Wallis v. J.R. Simplot Co.*, 26 F.3d 885, 891 (9th Cir. 1994); *Nesbit v. Pepsico, Inc.*, 994 F.2d 703, 704 (9th Cir. 1993); *Cassino v. Reichhold Chemicals, Inc.*, 817 F.2d 1338, 1343 (9th Cir. 1987); *Palmer v. United States*, 794 F.2d 534, 537 (9th Cir. 1986).

Plaintiff's Duties Not Abolished: The prevailing rule in the First Circuit is that the plaintiff need only show that following the dismissal the employer continued to need an employee to perform the plaintiff's former duties. This can be demonstrated by proof that the employer "sought a replacement with roughly similar skills or qualifications,"[31] actually "replaced [the plaintiff with] another with similar skills and qualifications,"[32] or "continued to have her duties performed by a comparably qualified person."[33] The race, gender or age of any actual replacement, however, is not an element of the *prima facie* case.

Non-Group Member Treated "More Favorably": Decisions in several circuits hold that the fourth requirement to establish a *prima facie* case is that the plaintiff show that persons outside of his or her own protected group were treated "more favorably."[34]

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[31]*Serrano-Cruz v. DFI Puerto Rico, Inc.*, 109 F.3d 23, 25 (1st Cir. 1996); *see Smith v. Stratus Computer, Inc.*, 40 F.3d 11, 15 (1st Cir. 1994)("her employer sought a replacement for her with roughly equivalent qualifications").

[32]*Mulero-Rodriguez v. Ponte, Inc.*, 98 F.2d 670, 673 (1st Cir. 1996); *see Goldman v. First National Bank of Boston*, 985 F.2d 1113, 1117 (1st Cir. 1993)(plaintiff "was replaced by a person with roughly equivalent job qualifications").

[33]*Smith v. F.W. Morse & Co., Inc.*, 76 F.3d 413, 421 (1st Cir. 1996).

[34]*Josey v. John R. Hollingsworth Corp.*, 996 F.2d 632, 638 (3d Cir. 1993)("other employees not in a protected class were treated more favorably"); *Weldon v. Kraft, Inc.*, 896 F.2d 793, 796 (3d Cir. 1990)("others not in the protected class were treated more favorably"); *Fuka v. Thomson Consumer Electronics*, 82 F.3d 1397, 1404 (7th Cir. 1995)("younger employees were treated more favorably"); *Weisbrot v. Medical College of Wisconsin*, 79 F.3d 677, 681 (7th Cir. 1996)(younger employees were treated more favorably); *Cole v. Ruidoso Mun. Schools*, 43 F.3d 1373, 1380 (10th Cir. 1994)("she was treated less favorably than her male counterparts").

Any Evidence Supporting Inference of Discrimination: Decisions in the Second Circuit reject any requirement that some particular type of evidence be adduced to establish the critical fourth element of a *prima facie* case. Rather, appellate decisions in that circuit instead repeatedly use a more general formulation, requiring proof that the "discharge occurred in circumstances giving rise to an inference of discrimination on the basis of . . . membership in th[e] class."[35]

Circuits With Multiplicity of Rules: There are seven circuits within which several different standards are in use, with no evident explanation for why a particular standard is utilized in each particular case. Each panel in these circuits chooses at will among these conflicting formulations, with the outcome of the appeal often turning on which formulation the panel opted to apply. This chaotic situation exists in the Third,[36] Fourth,[37] Fifth,[38] Seventh,[39]

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[35]*McLee v. Chrysler Corporation*, 109 F.3d 130, 134 (2d Cir. 1997); *Hargett v. National Westminster Bank, USA*, 78 F.3d 836, 838 (2d 1996)(discharge occurred "in circumstances giving rise to an inference of racial discrimination"); *Sutera v. Schering Corp.*, 73 F.3d 13, 16 (2d Cir. 1995)("the discharge occurred under circumstances giving rise to an inference of age discrimination"); *Quaratino v. Tiffany & Co.*, 71 F.3d 58, 64 (2d Cir. 1995)("the discharge occurred in circumstances giving rise to an inference of unlawful discrimination"); *Chambers v. TRM Copy Centers Corp.*, 43 F.3d 29, 37 (2d Cir. 1994)("discharge occurred in circumstances giving rise to an inference of discrimination on the basis of his membership in that class").

[36]*Lawrence v. National Westminster Bank New Jersey*, 98 F.3d 61, 66 (3d Cir. 1996)("plaintiff "must" prove "replacement sufficiently younger to permit a reasonable inference of age discrimination"); *Geraci v. Moody-Tottrup, Int'l*, 82 F.3d 578, 580 (3d Cir. 1996)(plaintiff must show she was discharged "under conditions that give rise to an inference of discrimination); *Josey v. John R. Hollingsworth Corp.*, 996 F.2d 632, 638 (3d Cir. 1993)(plaintiff must show "other employees not in a protected group were treated more favorably"); *EEOC v. Metal Service Co.*, 892 F.2d 341, 347 (3d Cir. 1990)(plaintiff must show he was "treated less favorably than others similarly situated"); *Williams*

Eighth,[40] Tenth,[41] and District of Columbia Circuits.[42]

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v. Giant Eagle Markets, Inc., 883 F.2d 1184, 1191 (3d Cir. 1989)(no fourth requirement at all).

[37]*Burns v. AAF-McQuay Inc.*, 96 F.3d 728, 731 (4th Cir. 1996)("following his discharge or demotion, the plaintiff was replaced by someone of comparable qualifications outside the protected class"); *Mitchell v. Ball*, 33 F.3d 450, 459 (4th Cir. 1994)("the position remained open to similarly qualified applicants after plaintiff's dismissal"); *Lawrence v. Mars, Inc.*, 955 F.2d 902, 905-06 (4th Cir. 1992);("evidence whose cumulative probative force supports a reasonable inference that his discha[illegible] was discriminatory").

[38]*Singh v. Shoney's, Inc.*, 64 F.3d 217, 219 (5th Cir. 1995)("after her discharge, the position she held was filled by someone not within her protected class"); *Mayberry v. Vought Aircraft Co.*, 55 F.3d 1086, 1090 (5th Cir. 1995)("white employees who engaged in similar acts were not punished similarly"); *Lindsey v. Prive Corp.*, 987 F.2d 324, 327 (5th Cir. 1993)("the job remained open or was filled by someone younger"); *Crum v. American Airlines, Inc.*, 946 F.2d 423, 428 (5th Cir. 1991)(plaintiff must show that he "was replaced by someone outside the protected class or . . . by someone younger . . . or show otherwise that his discharge was because of age").

[39]*Leffel v. Valley Financial Services*, 1997 U.S. App. LEXIS 11359, *17 (7th Cir. 1997)("some evidence from which one can infer that the employer took adverse action against the plaintiff on the basis of a statutorily proscribed criterion"); *Plair v. E.J. Brach & Sons*, 105 F.3d 343, 347 (7th Cir. 1997)("another, similarly situated but not of the protected class, was treated more favorably"); *Fuka v. Thomson Consumer Electronics*, 82 F.3d at 1404 ("younger employees were treated more favorably").

[40]*Helfter v. United Parcel Service*, 1997 U.S. App. LEXIS 13590, *13 (8th Cir. 1997)("the employer continued to attempt to fill the position with applicants having similar qualifications"); *Johnson v. Baptist Medical Center*, 97 F.3d 1070, 1072 (8th Cir. 1996)(plaintiff was "replaced by a male . . . or the circumstances surrounding the discharge otherwise created an inference of unlawful discrimination"); *Rothmeier v. Investment Advisers, Inc.*, 85 F.3d 1328, 1333 n.7 (8th Cir. 1996)(plaintiff "was replaced by a younger person after his dismissal").

The coexistence of these widely differing standards within a given circuit leaves litigants in considerable uncertainty as to their respective burdens, and invites district and appellate judges to select whichever standard will yield the result they may for other reasons favor in a particular case. We have set out in the notes above decisions in these circuits utilizing these differing standards.

The difference among the standards being applied in the circuit courts is widely recognized. The Seventh Circuit, for example, has expressly rejected, in an ADA case, the Sixth Circuit requirement that a plaintiff identify an identical, but non-discharged, non-group member:

> [P]roof that persons not disabled . . . were treated more favorably than the plaintiff . . . is certainly one of the most obvious ways to raise an inference of discrimination . . . . It should not be understood as the only means of doing so, however. [Plaintiff] . . . occupies a position of significantly greater

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[41] *Greene v. Safeway Stores, Inc.*, 98 F.3d 554, 558 (10th cir. 1996)("a younger person replaced [him]"); *Reynolds v. School District No. 1 Denver, Colorado*, 69 F.3d 1523, 1534 (10th Cir. 1995)("the position remained open or was filled with a non-minority"); *Cole v. Ruidoso Mun. Schools*, 43 F.3d at 1380 (plaintiff "was treated less favorably than her male counterparts"); *Trujillo v. Grand Junction Regional Center*, 928 F.2d 973, 977 (10th Cir. 1991)("after she was fired, her job remained open and the employer sought applicants whose qualifications were not better than her qualifications); *Allen v. Denver Public School Board*, 928 F.2d 978, 985 (10th Cir. 1991)("Nonminorities in the same or similar situations were not disciplined the same or similarly").

[42] *Neuren v. Adduci, Mastriani, Meeks & Schill*, 43 F.3d 1507, 1512 (D.C. Cir. 1995)("replacement by a person of equal or lesser ability who is not a member of a protected class or, alternatively, the position remains open after termination"); *Williams v. Washington Metropolitan Area Transit Authority*, 1987 U.S. App. LEXIS 17587 *3 (D.C. Cir. 1987)("white employees were retained in comparable circumstances").

> responsibility and discretion than that of most . . . employees. When cited for purported shortcomings in her performance, she may find it difficult to find evidence of disparate treatment in criticisms that are intertwined with the unique aspects of her position. But there may be other circumstances that bespeak discrimination.

Leffel v. Valley Financial Services, 1997 U.S. App. LEXIS 11359, *18-*19 (1997). That same decision also "disavowed . . . cases . . . suggesting that a Title VII plaintiff must show that she was replaced by someone of a different race, sex, and so on." *Id.* at *17. The Tenth Circuit, in requiring only that a discharged employee prove that someone was hired in her place after she was fired, acknowledged:

> Other courts have developed stricter tests; for example, some courts have held that . . . plaintiff must show that the employer either assigned a non-minority person to her job or retained non-minority employees having comparable or lesser qualifications.

Brown v. Parker-Hannifin Corp., 746 F.2d 1407, 1410 n.3 (10th Cir. 1984).

The circumstances of the instant case well illustrate the practical consequences of the differing standards in use in various federal courts. Because of petitioners' unique circumstances—as black grievants who had successfully raised racial discrimination in discipline under a collective bargaining agreement—no white employee could be found who was similarly situated. Thus petitioners could not satisfy the Sixth Circuit's similarly situated comparator requirement. Also, because petitioners were part of a larger pool of mechanics, no particular individual was hired to replace them when they were dismissed; thus they could not

have met the Eleventh Circuit's replacement requirement.[43]

On the other hand, petitioners clearly would satisfy the First Circuit requirement that they show that their employer continued to need workers with their particular skills.[44] The Second Circuit requirement that a dismissed worker offer some evidence supporting an inference of discrimination would also be satisfied,[45] for, as the dissenting judge below noted at length, there was a substantial body of such evidence in this case, albeit not the very particular type of evidence required by Sixth Circuit caselaw. (App. at pp. 7a-10a.)

B. The Decision Below Is In Conflict With Decisions of This Court.

The particular standard applied by the Sixth Circuit conflicts in several distinct ways with this Court's decisions regarding proof of intentional discrimination.

First, and most fundamentally, the imposition of a rigid formula as a condition for establishing a *prima facie* case, for demonstrating pretext, or for proving the ultimate fact of discriminatory intent is at odds with this Court's repeated admonitions that the *McDonnell Douglas* analysis is not to be mechanically applied in all cases, but is only to be used as a convenient tool where appropriate. *See,]Furnco Construction Corp. v. Waters*, 438 U.S. 567, 577 (1978); *]United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711 715 (1983); *St. Mary's Honor Center v. Hicks*, 125 L.Ed.2d at 424. Rather, the task of the fact-finder is to

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[43]See note 28, *supra*. *See also MacDonald v. Delta Air Lines, Inc.*, 94 F.3d 1437, 1441-42 (10th Cir. 1996)(dismissed airplane mechanic could not establish a *prima facie* case where no one was hired to replace him.)

[44]See note 31, *supra*.

[45]See note 35, *supra*.

determine whether, when the evidence is viewed *as a whole*, an inference of intentional discrimination (and/or retaliation) may be drawn. *Id.*

As this Court held in *Patterson v. McLean Credit Union*, 491 U.S. 164, 187-88 (1989):

> Although petitioner retains the ultimate burden of persuasion, our cases make clear that she must also have the opportunity to demonstrate that respondent's proffered reasons for its decision were not its true reasons. . . . *In doing so, petitioner is not limited to presenting evidence of a certain type.* . . . The evidence which petitioner can present in an attempt to establish that respondent's stated reasons are pretextual may take a variety of forms. . . . She may not be forced to pursue any particular means of demonstrating that respondent's stated reasons are pretextual. It was, therefore, error for the District Court to instruct the jury that petitioner could carry her burden of persuasion only by showing that she was in fact better qualified than the white applicant who got the job.

(Emphasis added.) The Sixth Circuit violated this cardinal rule by holding that petitioners could prevail only by "presenting evidence of a certain type," *i.e.*, that there were comparable white employees who were not discharged under similar circumstances.

By applying such a rule, the court of appeals affirmed the grant of summary judgment and deprived the petitioners of their right to have a jury determine whether the evidence *as a whole* led to an inference of discrimination. Once again, the approach of the Sixth Circuit is in sharp contrast to and conflicts with that of the Second Circuit, whose rule permits the consideration of all of the evidence to determine whether there were circumstances giving rise to an inference of discrimination. Not surprisingly, the results in the two circuits are dramatically different; the Second Circuit

strongly discourages the granting of summary judgment in employment discrimination cases,[46] while in the Sixth Circuit they are granted regularly by district courts[47] and affirmed routinely by the court of appeals.[48]

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[46] *See, e.g., Gallo v. Prudential Services*, 22 F.3rd 1219 (2nd Cir. 1994) *Henry v. Daytop Village*, 42 F.3d 89 (2d Cir. 1994).

[47] *See, e.g., Shelmon-Murchison v. Gerber Products Company*, 1996 U.S. Dist., LEXIS 20735, at *1 (S.D. Mich. Sept. 13, 1996)(no showing of "nearly identical" comparable that was similarly situated in all respects, *i.e.*, same supervisor, subject to same standards, engaged in same conduct); *Perkins v. Regents of the University of Michigan*, 934 F.Supp. 857 (S.D. Mich. 1996)(no showing of comparables); *Marhtel v. Bridgestone/Firestone, Inc.*, 926 F.Supp. 1293 (M.D. Tenn. 1996)(same); *Ahmed v. N.C. Servo Technology, Corp.*, 1996 U.S. Dist. LEXIS 6621, at *1 (E.D. Mich. 1996)(same); *Sinclair v. ATE Management & Service Company, Inc.*, 1996 U.S. Dist. LEXIS 19921, at *1 (E.D. Mich. Nov. 27, 1996)(same); *Thomas v. Hoyt, Brumm & Link, Inc.*, 910 F.Supp. 1280 (E.D. Mich. 1994)(same); *Steward v. BASF Corporation*, 1994 U.S. Dist. LEXIS 10261, at *1 (W.D. Mich. June 7, 1994)(no showing that plaintiff qualified for position or of comparable treated differently); *Bryer v. Hubert Distributors, Inc.*, 1991 U.S. Dist. LEXIS 14370, at *1 (E.D. Mich. May 13, 1991)(same); *Toyee v. Janet Reno*, 940 F.Supp. 1081 (E.D. Mich. 1991)(same); *Terwilliger v. GMRI, Inc.*, 952 F.Supp. 1224 (E.D. Mich. 1997)(same).

[48] A review of decisions by the Sixth Circuit from January, 1996, through March, 1997, reveals that out of forty-eight cases surveyed, the court affirmed district court grants of summary judgment for the defendant on the merits in thirty-two cases. Of the remaining sixteen, six decisions affirmed summary judgment for defendants on procedural or jurisdictional grounds, two decisions affirmed in part and reversed in part summary judgment for the defendant, and the other eight were favorable to the plaintiff. Most of the decisions were summary affirmances without published opinions. *See, e.g., Palmer v. Health Care and Retirement, Inc.*, 1997 WL 135451 (6th Cir. 1997); *Laughlin v. United Telephone-Southeast, Inc.*, 107 F.3d 871 (Table), 1997 WL 52921 (6th Cir. 1997); *Wilson v. Wells Aluminum Corp.*, 107 F.3d 12 (Table), 1997 WL 87218 (6th Cir. 1997); *LaPointe v. United Autoworkers Local 600*, 103 F.3d 485 (6th Cir. 1996); *White*

Second, the Sixth Circuit standard is inconsistent with the very idea of a *prima facie* case articulated in *McDonnell Douglas* and its progeny. The *prima facie* case required by this Court's decisions delineates the burden of production imposed on a plaintiff *before* consideration of any reasons an employer might proffer for a disputed employment action. The burden on the plaintiff is to adduce sufficient evidence to warrant a presumption of discrimination "if the employer is silent in the face of the presumption." *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. at 254; *see Furnco Construction Corp. v. Waters*, 438 U.S. 567, 576 (1978)(*prima facie* case met by evidence which, "if such actions remain unexplained," would support inference of discrimination.) The Sixth Circuit's insistence on evidence regarding a "comparable" white employee, however, requires a plaintiff to anticipate and respond to an employer's proffered explanation as part of his or her *prima facie* case. Under the Sixth Circuit's rule, the "similarly situated" white employee regarding whom a plaintiff must adduce evidence is a worker who, if he or she existed, would fall within the same standard or rule invoked by the employer to explain its

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v. United Autoworkers Local 600, 103 F.3d 485 (6th Cir. 1996); *Burrell v. Providence Hosp.*, 104 F.3d 361 (Table), 1997 WL 729281 (6th Cir. 1996); *Steele v. Electronic Data Systems Corp.*, 103 F.3d 131 (Table), 1996 WL 690142 (6th Cir. 1996); *Rowls v. Runyon*, 100 F.3d 957 (Table), 1996 WL 627712 (6th Cir. 1996); *Wathen v. Lexmark Intern, Inc.*, 99 F.3d 1140 (Table), 1996 WL 622955 (6th Cir. 1996); *Walker v. Runyon*, 99 F.3d 1140 (Table), 1996 WL 607197 (6th Cir. 1996); *Kocsis v. Multi-Care Management*, 97 F.3d 876 (6th Cir. 1996); *Jobe v. Hardaway Management Co., Inc.*, 98 F.3d 1342 (Table), 1996 WL 577638 (6th Cir. 1996); *Jackson v. Ford Dealer Computer Services, Inc.*, 95 F.3d 1152 (Table), 1996 WL 483028 (6th Cir. 1996); *Gerth v. Sears, Roebuck & Co.*, 94 F.3d 644 (Table), 1996 WL 464984 (6th Cir. 1996); *Wilson v. National Car Rental System, Inc.*, 94 F.3d 646 (Table), 1996 WL 452882 (6th Cir. 1996); *Butler v. Ohio Power Co.*, 91 F.3d 143 (Table), 1996 WL 400179 (6th Cir. 1996); *Mitchell v. White Castle Systems, Inc.*, 86 F.3d 1156 (Table), 1996 WL 279863 (6th Cir. 1996); *Hale v. Secretary, Dept. of Treasury*, 86 F.3d 1156 (Table), 1996 WL 279880 (6th Cir. 1996).

treatment of the plaintiff. Thus the Sixth Circuit compels a plaintiff, as part of his or her initial *prima facie* case, to adduce evidence of a very specific kind to prove the pretextuality of the employer's possible proffered explanation. This rule collapses the distinction between a *prima facie* case and proof of pretext, and exempts employers from the requirement of *McDonnell Douglas* and *Burdine* that they adduce "admissible evidence" of that explanation. *Burdine*, 450 U.S. at 255.

Third, under this standard the *only* method available to an employee to prove pretext is to show that an employer treated more favorably whites with comparable records, positions and supervisors. Although that would certainly be probative evidence, *McDonnell Douglas* itself makes clear that that is not the sole type of evidence sufficient to establish pretext.

> [Plaintiff] must . . . be afforded a fair opportunity to show that [the employer's] stated reason . . . was in fact pretext. Especially relevant to such a showing would be evidence that white employees involved in acts . . . of comparable serious [to the plaintiff's misconduct] were nevertheless retained or rehired. . . . *Other evidence* that may be relevant to any showing of pretext includes facts as to the [employer's] treatment of [plaintiff] during his prior term of employment . . . and [the employer's] general policy and practice with respect to minority employment."

411 U.S. at 792 (emphasis added).

Fourth, this Court has repeatedly made clear that a *prima facie* case requires only "evidence adequate to create an inference that an employment decision was based on a[n] [illegal] discriminatory criterion." *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. at --, 134 L. Ed. 2d at 432; see *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. at 253 (proof of "circumstances which give rise to an inference of

unlawful discrimination"); *Furnco Construction Corp. v. Waters*, 438 U.S. at 576, 580 (evidence sufficient to show discriminatory motive "more likely than not."). This is the very formulation applied by the Second Circuit, but rejected by the Sixth Circuit and other courts of appeals. In the Sixth Circuit plaintiffs like petitioners who do indeed adduce evidence supporting an inference of discrimination will nonetheless lose as a matter of law unless they can also adduce the requisite evidence regarding comparable "nearly identical" whites.

Fifth, "there must be at least a logical connection between each element of the *prima facie* case and the illegal discrimination." *O'Connor v. Consolidated Coin Caterers*, 134 L. Ed. 2d at 438. In the Sixth Circuit one essential element of a *prima facie* case is that the employer have in its employ at least one non-minority worker who held the same position as the plaintiff, served under the same supervisor as the plaintiff, and had essentially the same work record as the plaintiff. If there is no such "nearly identical" white worker with whom a plaintiff can be compared, his or her discharge claim fails as a matter of law. But the fact that a plaintiff had a unique job or a unique work record is by itself "irrelevant, so long as he has lost out *because of his [race]*." *O'Connor*, 134 L. Ed. 2d at 438 (emphasis in the original).

In sum, the Sixth Circuit has created precisely the sort of "rigid, mechanized [and] ritualistic" *prima facie* case requirement which this Court has repeatedly disapproved. *U.S. Postal Service Bd. of Govs. v. Aikens*, 460 U.S. 711, 715 (1983); *Furnco*, 438 U.S. at 577. The practical effect of this standard is to delineate a class of minority, female, disabled or over 40 workers—employees for whom there *is* no "nearly identical" comparator—who can with impunity be dismissed on the basis of race, national origin, gender, disability or age.

II.

CERTIORARI SHOULD BE GRANTED TO CORRECT A FUNDAMENTAL MISINTERPRETATION OF THE ANTI-RETALIATION PROTECTIONS OF 42 U.S.C. § 1981

The court of appeals held that petitioners' claim under § 1981 must fail because they allegedly failed to identify a specific contract provision that they enforced when they successfully grieved the first disciplinary action against them. App. 3a-5a. Judge Merritt, in dissent, correctly points out that this was factually in error. App. 8a. More fundamentally, however, the court of appeals was wrong as a matter of law, and misinterpreted the protection provided by section 1981 against retaliation for seeking to enforce contractual rights free of discrimination.

It is undisputed that the petitioners successfully exercised their contractual right to grieve a disciplinary action against them. It is also undisputed that one of the grounds for the successful grievance was that discipline was being carried out in a racially discriminatory fashion. Finally, the district court held that an inference of retaliatory motive could be made because the the second disciplinary hearing that resulted in petitioners' termination was held immediately after the grievance was won.[49]

Thus, petitioners alleged, and presented evidence to support the allegation, that their employer required them to go to second disciplinary hearings on short notice and without the opportunity to prepare fully, and discharged them purportedly because they refused to remain at the hearings, in order to retaliate against them for successfully enforcing their rights under the collective bargaining contract to grieve a prior disciplinary action. Further, they presented evidence that the motive behind the retaliatory action was the fact that they had challenged the first

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[49]App. 24a-25a. Other evidence supported the claim of retaliation; see *supra* at pp. 11-12.

discipline, in part, because of racial discrimination in the enforcement of the agreement.

The court of appeals' decision fundamentally misread section 1981. By requiring—years after a first trial *on the merits* of their claims—that plaintiffs demonstrate not only that they sought to enforce contractual rights free of racial discrimination and were subsequently retaliated against, but also have pleaded with particularity exactly what contractural right was sought to be enforced, the court eviscerated the protection against retaliation included in the statute. The issue of the scope of section 1981's protection against retaliation for seeking to enforce contractural rights free of discrimination is important and should be reviewed by this Court.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted and the decision of the court below reversed.

Respectfully submitted,

ELAINE R. JONES
DIRECTOR-COUNSEL

THEODORE M. SHAW
NORMAN J. CHACHKIN
CHARLES STEPHEN RALSTON
(Counsel of Record)
NAACP LEGAL DEFENSE &
EDUCATIONAL FUND, INC.
99 Hudson Street
Sixteenth Floor
New York, NY 10013
(212) 219-1900

ERIC SCHNAPPER
UNIVERSITY OF
WASHINGTON
SCHOOL OF LAW
1100 N.E. Campus Way
Seattle, WA 98195
(206) 616-3167

ELLIS BOAL
925 Ford Building
Detroit, MI 48226
(313) 962-2770

Attorneys for Petitioners

Appendix

[April 10, 1997]

No. 95-4171

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JAMES T. HARVIS, JR., et al.,
Plaintiff-Appellant,
v.
ROADWAY EXPRESS, INC.,
Defendant-Appellee.

BEFORE: MERRITT, RYAN AND SUHRHEINRICH, Circuit Judges.

PER CURIAM. Two African-American garage mechanics ("Plaintiffs") appeal summary judgment for their employer, Roadway Express, Inc. ("Defendant") in this action brought under 42 U.S.C. § 1981.[1] We **AFFIRM**

I.

This case has a long and complicated procedural history familiar to both parties. In summary, Plaintiffs were notified of, yet failed to appear at, a disciplinary hearing held to examine Plaintiffs' accumulated work record. Plaintiffs claim they were improperly notified of the hearing.[2] At the hearing, Defendant suspended Plaintiffs

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[1] Section 1981 states in relevant part that "[all] persons shall have the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens. . . ."

[2] Under the normal procedure for arranging disciplinary hearings Defendant would request a mutually agreeable hearing date with the union. Defendant would send an employee's notice of the hearing via certified or registered mail. In the case at bar, Plaintiffs were not given such written notice via the mail. Instead, they were informed verbally of their hearings on the same day that the hearings were

for two days without pay. Plaintiffs properly grieved their suspension, arguing that they were contractually entitled to written notice of the hearings and that such notice was routinely provided to white employees. Without addressing the merits of the suspensions, the grievance committee reinstated Plaintiffs and awarded them back pay, citing "improprieties". Defendant scheduled another disciplinary hearing to be held approximately 72 hours after Plaintiffs were reinstated. Defendant notified Plaintiffs of the hearing, and Plaintiffs were not present during the proceedings. Defendant conducted the hearing and discharged Plaintiffs. Defendant also discharged a white mechanic who failed to attend the hearing after receiving proper notification.

Plaintiffs brought suit, and the district court dismissed Plaintiffs' § 1981 claim, holding that it did not survive analysis under *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989).[3] On appeal, this Court held that the district court misapplied *Patterson* and erred in dismissing Plaintiffs' 1981 claim. *Harvis v. Roadway Express, Inc.*, 973 F.2d 490 (6th Cir. 1992). On remand the district court granted Defendant summary judgment, holding that Plaintiffs failed to establish two essential elements of the *McDonnell Douglas/Burdine*[4] test necessary to state a prima facie case under § 1981. Plaintiffs filed a timely appeal.

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held.

[3]The Supreme court in *Patterson* drastically circumscribed the reach of discrimination actions brought under § 1981. Specifically, the court held that § 1981 does not apply to discrimination in terms, conditions, and termination of employment, but rather only forbids discrimination in the formation of contracts and enforcement of contract rights.

[4]*McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1972); *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981).

II.

This court reviews de novo the district court's grant of Defendants' motion for summary judgment. *Hartsel v. Keys*, 87 F.3d 795, 799 (6th Cir. 1996). This court must affirm the district court only if it determines that the pleadings, affidavits, and other submissions show "that there is no genuine issue as to any material face and that the moving party is entitled to a judgment as a matter of law." *Id.* (quoting Fed. R. Civ. P. 56(c)).

The *McDonnell Douglas/Burdine* formula is the evidentiary framework applicable not only to claims brought under title VII, but also to claims under § 1981. *Mitchell v. Toledo Hosp.*, 964 F.2d 577, 581 (6th Cir. 1992). The district court formulated the following test to establish a prima facie § 1981 case of retaliatory contract impairment:

1) plaintiff is a non-white;
2) plaintiff enforced or exercised a specific contract right;
3) plaintiff was subject to an adverse employment action; and
4) there is a causal link between both plaintiff's enforcement or exercise of the contract right and plaintiff's race.

See generally Mitchell, 964 F.2d at 581, 582.

Plaintiffs clearly satisfy elements one and three of the *McDonnell Douglas/Burdine* test -- they are African-American and their discharge was an adverse employment action. We agree with the district court, however, that Plaintiffs fail to raise a genuine issue of material fact concerning the second and fourth factors.

In order for Plaintiffs to establish a § 1981 claim for retaliatory impairment, they must have exercised a specific

contractual right. *Mozee v. American Commercial Marine Service Co.*, 940 F.2d 1036, 1052 (7th Cir. 1991). Throughout the course of litigation, Plaintiffs have changed their theory of what specific contract right they have enforced or exercised. Originally, Plaintiffs claimed retaliatory discharge that punished them for enforcing their contract right to receive notice equal to that received by whites. *Harvis*, 973 F.2d at 494. Plaintiffs acknowledged in their briefs to the district court, however, that this alleged contractual right to notice was never expressly granted under the collective bargaining agreement. (J.A. at 321). Next, Plaintiffs argued that such a right to written notice became part of the collective bargaining agreement custom. We agree with the district court that no such contractual right to written notice is contained either expressly or impliedly in the collective bargaining agreement. Furthermore, Plaintiffs have not produced any evidence showing that they received any less notice than white employees, or that the level of notice they received was in any way influenced by their race.

In their most recent appearance before the district court, Plaintiffs alleged that they were exercising their rights under the collective bargaining agreement, specifically grieving the issue of racial discrimination in the enforcement of discipline, and therefore in the administration of the collective bargaining agreement. This argument, too, must fail, for the reasons expressed by the district court. "Defendant first received notice of this theory of recovery at oral argument on defendant's motion for summary judgment, nine yearsnt[sic] would appear to be entitled to summary judgment on this claim on this basis alone." Opinion and Order at 13. We find that the district court did not abuse its discretion in denying Plaintiffs the opportunity to amend their pleadings. *See Fomen v. Davis*, 371 U.S. 178, 182 (1962).

In analyzing Plaintiffs' claim under the fourth prong of the *McDonnell Douglas/Burdine* test, we first ask whether

there was evidence that the dismissal may have had a retaliatory motivation, and second, whether the retaliation was based upon race. We find that the district court properly held that the timing of Plaintiffs' discharges, approximately seventy-two hours after their exercise of the contractual right to grieve, raises the inference of retaliation. *Wrenn v. Gould*, 808 F.2d 493, 501 (6th Cir. 1987) ("'[C]ausal connection' may be demonstrated by the proximity of the adverse action to the protected activity").

We further agree with the district court that Plaintiffs failed to establish a racial motivation for their discharges. Plaintiffs presented no evidence of any comparables that could possibly raise an inference of a racial motivation in the alleged retaliation, and they failed to present any direct evidence of a racial motivation for defendant's actions.

It is undisputed that the only white mechanic who received notice of the second disciplinary hearing and who failed to attend was discharged along with Plaintiffs. We simply do not agree with Plaintiffs' contention that the use of comparables in this case is unlikely, if not impossible. According to Plaintiffs, no white employee could have been comparable to them because no white employee could have had the occasion to enforce their contractual rights against race-based discrimination in the administration of discipline. Plaintiffs have produced no evidence that they were the victims of race-based discrimination in the administration of discipline.

If we hold that there are no comparables in this case given the racial basis of Plaintiffs' claim, their case must still fail for they are left without direct evidence to support their racial motivation claim. "It is now quite well-established that,in order to withstand a motion for summary judgment, the party opposing the motion must present 'affirmative evidence' to support his/her position; a mere 'scintilla of evidence' is insufficient. *Mitchell*, 964 F.2d at 584 (citing

Anderson v. Liberty Lobby Inc., 477 U.S. 242 (1986)). Plaintiffs' failure to present affirmative evidence of race discrimination if fatal to their claim under the fourth prong of the *McDonnell Douglas/Burdine* test. Consequently, Plaintiffs do not survive a motion for summary judgment.

Assuming that Plaintiffs established a prima facie case of retaliatory impairment, Defendant has proffered a legitimate, non-discriminatory reason for Plaintiffs' discharges. Namely, Defendant states that Plaintiffs were discharged for their accumulated work records and because they disobeyed direst orders to attend their second set of disciplinary hearings.

The Supreme Court in *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502 (1993), stated that "a reason cannot be proved to be 'a pretext for discrimination' unless it is shown both that the reason was false and that discrimination was the real reason." 509 U.S. at 515. Plaintiffs have done nothing to rebut defendant's legitimate, non-discriminatory reason for their termination, nor have they offered any evidence of Defendants' discriminatory animus. At oral argument, Plaintiffs asserted that the firing of the white mechanic was merely a cover-up by Defendant, and they supported their theory with general reference to the facts and circumstances of the case. Absent support in the record to back up such an argument, however, Plaintiffs fail to create a genuine issue of material fact regarding Defendant's proffered explanation.

As a result, we hold that the district court properly granted defendant's motion for summary judgment. **AFFIRMED**

MERRITT, Circuit Judge, dissenting. This case should be tried on the merits and not disposed of on summary judgment. There is clearly a material dispute of fact on the issue of racial discrimination.

On August 22, 1986, Roadway verbally notified the plaintiffs that they were required to attend disciplinary hearings later that day on the basis of their accumulated work record. The plaintiffs refused to attend the hearings, claiming that they had inadequate notice. The plaintiffs claimed that they were entitled to notice by certified mail as a result of Roadway's consistent customary practice. Roadway conducted the hearings without the plaintiffs, and assessed a two-day suspension without pay against plaintiff for "minor infractions," including wasting time and wearing improper shoes to work.

The plaintiffs used the grievance procedure provided for in their collective bargaining agreement to challenge their suspensions before the Toledo Local Joint Grievance Committee. The plaintiffs argued three grounds in their grievance. First, the plaintiffs maintained that Roadway discriminated against black employees by scheduling hearing dates for them sooner after initially requesting disciplinary hearings than in the case of white employees. In particular, the plaintiffs alleged that disciplinary hearing requests for three white employees (Sedelbauer, Bradley and Swartzfager) had been outstanding longer than the requests for plaintiffs' hearings when the plaintiffs' hearings were held. Second, the plaintiffs claimed that they had not received proper notice of their hearings. Finally, the plaintiffs argued that they were suspended without just cause. The Committee granted the plaintiffs' grievances based on "improprieties," and awarded both plaintiffs two days of back pay.

This decision angered James O'Neill, Roadway's labor relations manager. Immediately after the grievance panel issued its decision, Roadway scheduled new disciplinary hearings for the plaintiffs to be conducted within 72 hours. At the same time, Roadway scheduled hearings for Bradley, Sedelbauer and Swartzfager on the same time schedule. The plaintiffs showed up for these hearings, but

stated that they had not received adequate notice and then left. Roadway claims, but the plaintiffs dispute, that the plaintiffs were given direct orders to attend the hearings and were told that they would be fired if they did not attend. The plaintiffs refused to attend and were, in fact, fired. One white employee, Sedelbauer, also refused to attend his hearing and was fired. Swartzfager attended his hearing and received a two-day suspension. Bradley had the hearing day off and did not attend his hearing. The hearing was held without him and he received a two-day suspension.

* * *

There is no dispute that the plaintiffs successfully grieved their initial disciplinary hearings based on violations of the collective bargaining agreement. Plaintiffs claim that they were fired in retaliation for what enforcement of their contract rights. The district court found that the plaintiffs were barred from making this claim because they raised this argument for the first time at oral argument on the defendant's summary judgment motion. That finding of waiver of plaintiffs' racial animus claim is clearly erroneous. In a prior appeal in this case, this court stated "Rivers and Davison were punished, they contend, for trying to utilize the established legal process for their grievances." Moreover, in a section of the plaintiffs' summary judgment brief titled "Plaintiffs' successful enforcement of the contract set in train a series of retaliatory actions by Roadway culminating in their discharge," the plaintiffs allege that there was a "direct line of events from the grievance decision to the discharges" and that "Roadway set up *and* conducted the [second] hearings in fury for having been had on September 23 [the date of the grievance committee decision]." J.A. 323.

Roadway says that there could not have been racial animus for the firing because three white employees were given disciplinary hearings with the same 72-hour time frame

as the plaintiffs and that the one white employee who also defied a direct order and refused to attend was also fired. Plaintiffs argue that the white employee who was fired was simply sacrificed to cover the plaintiffs' race-based discharges. There is evidence to support plaintiffs' claim.

My review of the case indicates that the plaintiffs have submitted sufficient evidence to raise a question of fact. In particular, the plaintiffs rely on the following testimony from the earlier title VII trial in this case:

1. Roadway labor relations manager James O'Neill testified that he scheduled Sedelbauer's hearing and the hearings of two other white employees within the same 72-hour time frame as the plaintiffs' second hearings because the plaintiffs had alleged racial discrimination in their grievance proceedings. R. 327 at 531.
2. Employee Richard Crawford testified that, prior to the events involving the plaintiffs, on three separate occasions he witnessed white employees disobey direct orders without being disciplined. R. 327 at 376-77 (J.A. 486-87).
3. White employee Russell testified that, after the plaintiffs were discharged, he was discharged for violating a direct order. Russell grieved his discharge and was reinstated. After he returned to work, one supervisor (Guy) told him that no one in the tractor shop had wanted him fired, and supervisor Horton and G.O.M. Floyd told him that he was fired "so Roadway would have a defense [in this action] that they don't only fire black people ..." R. 327 at 332-36.

This evidence appears credible and raised a legitimate issue of material fact on the question of racial motivation. It may

well be that racial motives did play a substantial role here, and for that reason the case should go to a jury and not be short-circuited through the summary judgment process.

[May 25, 1995]

No. 3:86CV7955
IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

JAMES T. HARVIS, JR., et al.,
Plaintiffs,

v.

ROADWAY EXPRESS, INC.,
Defendants.

OPINION AND ORDER

POTTER, J.:

This cause is before the Court on defendant Roadway's motion for summary judgment, plaintiffs River's and Davis's opposition and defendant's reply. Oral argument on defendant's motion was held on May 4, 1995. For the reasons that follow, defendant's motion will be granted.

The procedural history of this case is long, somewhat tortuous, and adequately recounted in the parties' briefs. the Court will only recount that portion of this chronology which is germane to the subjects currently at issue.

When this case was originally before this Court, the Court properly ruled that plaintiffs' claims under 42 U.S.C.

1981[1] for discriminatory discharge did not survive the Supreme Court's decision in *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989).[2] On appeal, the Sixth Circuit reversed and remanded on the § 1981 issue only, determining that plaintiffs had adequately alleged a claim under § 1981 for discriminatory contract impairment. *Harvis v. Roadway Express, Inc.*, 973 F.2d 490, 497 (6th Cir. 1992). The court stated that plaintiffs

> [A]re not making discriminatory discharge claims, but rather are claiming retaliatory discharge that punished them for enforcing their contract right to receive notice. . . . [W]e find that sufficient allegations exist to form the basis of a retaliatory discharge claim. . . . We find the appellants' claims fall within the *Patterson* definition of permissible § 1981 actions, as the claims involve discrimination in the right to enforce a contract.

Id. at 494. The defendant now moves for summary judgment on plaintiffs' § 1981 discriminatory contract impairment claims, arguing that there are no material facts in dispute and that defendant is entitled to judgment as a matter of law.

Under the Federal Rules of Civil Procedure,

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[1]42 U.S.C. § 1981 provides, in pertinent part: "All persons within the jurisdiction of the United States shall have the same right ... to make and enforce contracts ... as is enjoyed by white citizens....

[2]The Supreme court in *Patterson* drastically circumscribed the reach of discrimination actions brought under § 1981. Specifically, the court held that § 1981 does not apply to discrimination in terms, conditions, and termination of employment, but rather only forbids discrimination in the formation of contracts and enforcement of contract rights. 491 U.S. at 176. *See also McKnight v. General Motors Corp.*, 908 F.2d 104, 108 (7th Cir. 1990).

> summary judgment is proper only where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Red. R. Civ. P. 56(c). The Supreme Court has recently stated that the inquiry is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 106 S.Ct. 2505, 2512 (1986). . . . In reviewing a motion for summary judgment, however, all inferences "'must be viewed in the light most favorable to the party opposing the motion.'" *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 106 S.Ct. 1348, 1356-57 (1986)(quoting *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962)).

Ralph Shrader, Inc. v. Diamond International Corp., 833 F.2d 1210, 1213 (6th cir. 1987).

> *Matsushita* demands only that the nonmoving party's inferences be reasonable in order to reach the jury, a requirement that was not invented, but merely articulated in that decision. If the [nonmoving party's] theory is . . . senseless, no reasonable jury could find in its favor, and summary judgment should be granted.

Eastman Kodak Co. v. Image Technical Servs., Inc., 112 S.Ct. 2072, 2083 (1992)(footnote omitted).

The party moving for summary judgment "always bears the initial responsibility of informing the district court of the ba sis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits if any' which [he] believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The substantive law of the case identifies which facts

are material. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Therefore, only disputes of facts affecting the outcome of the suit under the applicable substantive law will preclude the entry of summary judgment. *Id.* A moving party may discharge its burden "by 'showing'— that is, pointing out to the district court — that there is an absence of evidence to support the nonmoving party's case." *Celotex*, 4 77 U.S. at 324-325. Where the moving party has met its initial burden, the adverse party "must set forth specific facts showing that there is a genuine issue for trial." *Anderson*, 477 U.S. at 250.

> [W]here the nonmoving party will bear the burden of proof at trial on a dispositive issue, a summary judgment motion may property be made in reliance solely on the "pleadings, depositions, answers to interrogatories, and admissions on file." . . . Rule 56(e) therefore requires the nonmoving party to go beyond the pleadings and by her own affidavits, or by the "depositions, answers to interrogatories, and admissions on file," designate "specific facts showing that there is a genuine issue for trial."

Celotex, 477 U.S. at 324.

Despite the voluminous record in this case, the facts that are relevant to plaintiffs' § 1981 claims are relatively simple. Plaintiffs Rivers and Davison were employed by defendant as mechanics. Both plaintiffs are black. On the morning of August 22, 1986, defendant verbally informed plaintiffs that they were required to attend disciplinary hearings that were based upon their accumulated work records. The hearings were scheduled to occur that same day. Both plaintiffs refused to attend, arguing that the defendant gave them inadequate notice. The hearings were held without the plaintiffs' presence, and both were given two-day suspensions without pay.

Plaintiffs challenged the suspensions, pursuant to a grievance clause contained in the collective bargaining agreement, arguing that they were contractually entitled to written notice of the hearings and that such notice was routinely provided to white employees. Plaintiffs successfully grieved the suspensions to the Toledo Local Joint Grievance Committee (TLJGC). On September 22, 1986 the TLJGC granted the grievances based upon "improprieties" and awarded each plaintiff two days back pay. The TLJGC did not address the merits of the actual suspensions.

Almost immediately after the successful challenge, plaintiffs and three other Caucasian Roadway employees, Swartzfager, Sedelbauer and Bradley, were given notice that they all would have disciplinary hearings within seventy-two hours. After some discussion between the defendant and plaintiffs' union, the new hearings were scheduled for September 26 at 7:00 A.M. Because the merits of the suspensions were not addressed by the TLJGC, the plaintiffs' hearings were again intended to address the plaintiffs' accumulated work records.

On the morning of the hearings, plaintiffs again refused to attend, again claiming insufficient notice. Plaintiffs refused to attend the hearings despite being directly ordered by several management employees to do so and despite being warned by a union official that failure to attend the hearing could result in their ultimate discharges. The orders were issued and the hearings held when the plaintiffs were "on the clock" and had a commensurate duty to obey orders. The hearings were again held in the absence of the plaintiffs, and both plaintiffs were discharged as a result of the hearings. Specifically, plaintiffs were discharged for their accumulated work records coupled with their refusal to obey direct orders to attend the hearings.

Like the plaintiffs, employee Sedelbauer also refused several direct orders to attend his disciplinary hearing. The

orders were given and hearing held when Sedelbauer was also "on the clock." Sedelbauer was discharged for his accumulated work record and for disobeying a direct order. Employee Bradley was scheduled to have the day of his hearing off. Bradley also did not attend his hearing, but received a two-day suspension rather than a discharge. Unlike the plaintiffs and Sedelbauer, however, Bradley never received a direct order to attend his hearing as he was not at work that day. Employee Swartzfager was at work that day and did receive a direct order to attend his disciplinary hearing. Unlike plaintiffs and Sedelbauer, Swartzfager chose to attend. He was not discharged and only received a disciplinary "record of hearing." This lawsuit followed these events.

Before turning to the merits of plaintiffs' allegations, the court must first discuss the nature and the elements of a § 1981 retaliatory impairment claim. Not surprisingly, there is little case law addressing this portion of § 1981 jurisprudence, so the Court will look to *Patterson*, the guidance provided by the Sixth Circuit in their remand order, and to case law in other circuits. Once the elements of a § 1981 retaliatory impairment claim are set forth, the Court will apply the *McDonnell Douglas/Hicks* evidentiary framework to plaintiffs' causes of action. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1972); *St. Mary's Honor Center v. Hicks*, 113 S.Ct. 1742 (1993).

Under *Patterson*, there are two ways that 42 U.S.C. § 1981 may be violated: an action may be taken, based on race, to prevent someone from entering into a contract, or an action may be taken, based on race, that would prevent or impair someone from enforcing or exercising a right that arose under an existing contract. *Patterson*, 491 U.S. at 176. Retaliation, or punishing an individual based upon race for

enforcing a contract right, is a subset of the latter.[3]

It is important to note that, unlike Title VII, § 1981 retaliation requires proof of a racial motive. Merely exercising a contract right is not a protected activity under § 1981; thus retaliation requires proof of both a retaliatory and racial animus.[4] *See e.g., McKnight v. General Motors Corp.*, 908 F.2d 104, 111 (7th Cir. 1990)(the retaliation must have a racial motive); *Mozee v. American Commercial Marine Service Co.*, 940 F.2d 1036, 1052 (7th Cir. 1991)(in examining a § 1981 claim for retaliation, a court "must inquire [as to] whether the plaintiffs experienced retaliation with respect to an effort to enforce contract rights (as opposed to statutory anti-discrimination rights) and whether any such retaliation occurred because of plaintiff's race.")

In *Harvis*, the Sixth Circuit also held that § 1981 covers the enforcement of any contract right, "not just anti-

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[3]The best way to illustrate the difference under § 1981 between an impairment and a retaliatory impairment claim is by example. In the former, an employee may state a cause of action if, because of his race, his employer prevents or hampers his enforcement of a contract right. In the latter, the employee is initially allowed to exercise the contract right, but subsequently the employer punishes the employee for exercising the right, based upon the employee's race.

[4]In their brief, plaintiffs cite two cases to support the proposition that this Circuit only requires proof of retaliatory motive to state a § 1981 retaliation claim. Plaintiff is mistaken. The first case cited, *Winston v. Lear-Seigler, Inc.*, 558 F.2d 1266 (6th Cir. 1977) does not deal with retaliatory impairment and merely stands for the proposition that, in certain circumstances, a Caucasian has standing to bring suit under § 1981. *Id.* at 1268. The second case cited by plaintiff, *Cooper v. City of North Olmstead*, 795 F.2d 1265 (6th Cir. 1986), deals specifically with retaliatory discharge under Title VII and § 1981. *Patterson* destroyed the viability of any retaliatory discharge claim plaintiff may have had under § 1981. *Id.* at 1270. *Cooper* does not address a § 1981 retaliatory impairment claim.

discrimination contract rights." 973 F.2d at 494; *see also Sherman v. Burke Contracting, Inc.*, 891 F.2d 1527, 1535 (11th Cir. 1990)(§ 1981 does not apply where employee does not allege that the retaliation was related to plaintiff's attempt to enforce a specific contract right). In this case, then, it is irrelevant what contract right plaintiffs allege they were exercising, as long as they were in fact exercising an actual right guaranteed by their collective bargaining agreement. Thus, if plaintiffs were not exercising a contract right, plaintiffs have no § 1981 cause of action. *See McKnight*, 908 F.2d at 112 (no § 1981 cause of action where employee engaged in activity protected by anti-discrimination law, but not activity provided for by contract right); *Mozee*, 940 F.2d at 1053-54 (employee did not state § 1981 claim where retaliation could not be attributed to enforcement of contract rights).

In light of the above precedent, the court holds that, in order to establish a prima facie case of § 1981 retaliatory impairment, plaintiffs must provide evidence to establish the following:

1) plaintiff is a non-white;
2) plaintiff enforced or exercised a specific contractual right;
3) plaintiff was subject to an adverse employment action;
4) there is a causal link between *both* plaintiffs's enforcement or exercise of the contract right and plaintiff's race.

Defendant argues that this cause of action should include a fifth element; that plaintiffs prove that their ability to enforce their contract rights was actually impaired by the alleged retaliation. The argument follows that, as plaintiffs again grieved their discharges after the alleged retaliatory action, plaintiffs cannot establish that their ability to enforce the contractual right to grieve was impaired by the alleged

retaliation. This contention, however, misapprehends both the nature of a retaliation claim and the difference between retaliatory impairment and simple impairment under § 1981.[5]

The Sixth Circuit has determined that discriminatory discharge actions under § 1981 do not survive *Patterson*, because discharge does not involve contract formation or, generally, contract enforcement. *See, e.g., Prather v. Dayton Power & Light Co.*, 918 F.2d 1255 (6th Cir. 1990). Since a discharge from employment, by and of itself, does not establish a contract impairment and, as *Patterson* dictates that § 1981 does not apply to events that occur after the termination of a contract, no contract impairment can ever occur after discharge from employment under § 1981.

Under defendant's analysis then, since all contractual rights and, thus, all § 1981 protections end at the termination of a contract, a plaintiff who had been subject to a retaliatory discharge would virtually never be able to establish a prima facie case of retaliatory impairment because the discharged employee has no post-termination contractual rights to impair. This stands in odd contrast to a different plaintiff, subject to a less drastic retaliatory sanction, who could more readily establish a prima facie case, as his employment contract had not been terminated. This would then lead to the somewhat anomalous result of essentially insulating from § 1981 liability any employers who retaliate against a minority employee's exercise of a contractual right by discharging him. The Sixth Circuit did not envision such a peculiar result.

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[5]The Court notes that were defendant correct in this argument, then they would be entitled to summary judgment on plaintiffs' claims, as plaintiffs have come forward with no evidence, other than the alleged retaliation, to establish an impairment in their ability to enforce the contract.

To require a showing of actual impairment in a § 1981 retaliation action would also defeat the purposes of recognizing retaliatory impairment as a separate cause of action under § 1981. For example, a plaintiff who pleads a cause of action for simple contract impairment under § 1981 will typically have been, based upon race, prevented from or interfered with in the exercise of a specific contract right. The prohibited action on the employer's part is the unlawful interference. In a retaliation action, however, the plaintiff is allowed to exercise the contract right, and the retaliation occurs subsequently. The prohibited action and, realistically, the impairment, is the actual retaliation. If a plaintiff were required to prove some subsequent impairment after the alleged retaliation, plaintiff would need not claim a retaliation cause of action, but could directly proceed on a simple contract impairment theory of recovery on the subsequent impairment.

Harvis also indicates that in a § 1981 retaliation action a plaintiff need not show impairment. The Sixth Circuit indicates that access to the contract enforcement mechanism, here the first or second grievance proceeding, is irrelevant; rather, it is the more oblique effects of the retaliation that serve as the impairment:

> Just because [plaintiffs] were allowed to use the available legal process does not mean the employer did not discriminate against them through retaliation for the very act of using that legal process. Retaliation is defined more broadly than mere access to legal process. . . . *McKnight v. General Motors Corp.* . . . held that retaliation is a common method of deterrence.

973 F.2d at 494 (citations and quotations omitted). It is the chilling effect of the retaliation that impairs the right to enforce the contract; the fact that these plaintiffs may not

have been deterred by the alleged retaliation is irrelevant.[6] This view is also consistent with retaliation jurisprudence in other areas of the law. *See, e.g., Laird v. Tatum*, 408 U.S. 1, 11-14 (1972); *EEOC v. Ohio Edison Co.*, 7 F.3d 541, 545 (6th Cit. 1993); *Graham v. National Collegiate Athletic Ass'n*, 804 F.2d 953, 959 (6th Cir 1986); *Boals v. Gray*, 775 F.2d 686, 689 n.5 (6th 1985); *Reichert v. Draud*, 701 F.2d 1168, 1173 (6th Cir. 1983) (Krupansky J., concurring); *Brock v. Casey Truck Sales, Inc.*, 839 F.2d 872, 978-79 (2nd Cir. 1988). The Court determines that where a plaintiff is alleging a § 1981 cause of action for retaliatory contract impairment, if the plaintiff establishes proof that an adverse employment action was motivated by both race and retaliation, the plaintiff need not establish any additional contractual impairment.

There is one other item worthy of note before the Court turns its discussion to an analysis of the undisputed facts. In its briefs and at oral argument, defendant argues that the dual causation standard used in *Daniels v. Pipefitters' Local Union No. 597*, 945 F.2d 906 (7th cir. 1991), applies to this action. At oral argument, plaintiffs also conceded that they, while taking issue with the standard, were prepared to proceed under it. *Daniels* contains the following language regarding § 1981 actions: "First the plaintiff must show that the defendant interfered with his right to enforce the contract on account of race. Second, the plaintiff must then show that the retaliation itself had a racial motivation. 945 F.2d at 917. This portion of *Daniels*, however, is not controlling in this Circuit and appears to be inconsistent with prior Seventh Circuit § 1981 case law. *See, e.g., McKnight*, 908 F.2d at 111; *Mozee*, 940 F.2d at 1052-54.

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[6]The fact that plaintiffs grieved the results of the second disciplinary hearing also does not necessarily establish that plaintiffs were not deterred; at this point, plaintiff had been terminated and had nothing to lost by grieving.

As stated earlier, there are two types of contract impairment actions a litigant may bring under § 1981: the litigant may allege that a defendant directly interfered with his ability to exercise a contract right based upon race, or the litigant may allege that a defendant retaliated against the litigant for the prior exercise of a contract right. the above-cited language in *Daniels* implies that a plaintiff must prove that both scenarios occurred in order to prevail on a § 1981 retaliatory impairment case. The Court concludes that this causation standard is neither the correct standard for a § 1981 retaliatory impairment action, nor the standard implied by the Sixth circuit in its remand order in this case. *See Harvis*, 973 F.2d at 494. The Court holds that to establish causation, plaintiffs must merely prove that the adverse employment action had both a racial and retaliatory motive.

The Court now turns its attention to the facts that are undisputed in the case at bar. There is no doubt that plaintiffs can establish the first and third elements of their prima facie case; that is, they are African-American and their discharge was an adverse employment action. Both parties dispute, however, whether the facts in this case establish the second and fourth elements of plaintiffs' prima facie case. The Court will deal with these issues in turn.

In order for plaintiffs to establish a § 1981 claim for retaliatory impairment, they must have exercised a specific contractual right. *See Mozee*, 940 F.2d at 1052. The Court notes at the outset that plaintiffs apparently have a difficult time deciding exactly what cause of action they are pleading under § 1981. The Sixth Circuit remanded this case because plaintiffs had sufficiently alleged a cause of action for retaliatory impairment, despite the fact that plaintiffs never precisely pled this cause in their complaint nor in their amended complaint, and there is still some confusion as to what precise contract right plaintiffs allege they were exercising.

Plaintiffs argued to the Sixth Circuit that "they are not making discriminatory discharge claims, but rather are claiming retaliatory discharge that punished them for enforcing their contract right to receive notice equal to that received by whites." *Id.* at 494 (emphasis added). Plaintiffs concede in their brief, however, that there is no such express right to notice of a disciplinary hearing in the collective bargaining agreement. Plaintiffs instead argue that such a right became part of the CBA by custom; unfortunately, plaintiffs cite no law, other than an arbitration manual, and no facts or competent evidence to support such a conclusion. Indeed, the evidence presented by defendant unequivocally establishes that there is no contractual right to notice contained expressly or impliedly in the CBA. The Court holds that there was no contractual right to notice; and, therefore, plaintiffs cannot establish a prima facie case in this instance.

During oral argument plaintiffs also, for the first time, raise the argument that they were enforcing their contractual right to grieve differences with their employer that arise out of the CBA. Defendant concedes that there is such an express contractual right, and plaintiffs did exercise it.

This case is not nine years old. Plaintiffs never pleaded nor alleged nor even mentioned in passing this theory of recovery when the case was before the Court initially. It was also not argued before the Sixth Circuit and was not even raised in plaintiffs' opposition to defendant's motion for summary judgment. There comes a time in the life of a case when a litigant must settle on a theory or theories of recovery and stick to it; that is a primary tenet of the notice pleading theory of the civil Rules. Defendant first received notice of this theory of recovery at oral argument on defendant's motion for summary judgment, nine years after the inception of this case. Defendant would appear to be entitled to summary judgment on this claim on this basis

alone.

Nevertheless, this determination is hardly outcom-determinative as plaintiffs are also unable to establish the fourth element of their prima facie case, that defendant was motivated by both race and retaliation.

Plaintiffs may establish the alleged dual motivation by use of comparables. Defendant argues that, due to this action's dual motivation requirement, a plaintiff may never use comparables to establish a prima facie case. Defendant asserts this to be true because the comparables are used under the "assumption that a single motive explains the employer's decision" to take an adverse employment action. *Terbovitz v. Fiscal Court of Adair Cnty.*, 825 F.2d 111, 114 (6th Cir. 1987). In other words, a comparable may not be used if it permits more than one reasonable inference with respect to motivation, and any comparable used by plaintiffs would by necessity lead a fact finder to speculate as to whether race or retaliation motivated the defendant.

The Court finds defendant's argument interesting in the abstract, but hypertechnical in its application. The difficulties cited by defendant in the use of comparable can be circumvented by merely bifurcating the factual inquiry: first, is there evidence that the adverse action may have a retaliatory motivation; and, second, was the retaliation based upon race? In the first instance, the temporal proximity of the adverse action to the exercise of the contract right may be used to establish the inference of retaliation. *See e.g.*, *Mozee*, 940 F.2d at 1053. Only after this would the fact finder look for a racial motive for the retaliation. This racial motivation can be established by using comparables, although with the more numerous variables involved it is admittedly more complex and difficult than an analogous standard Title VII case.

In this case, the time of plaintiffs' discharges,

approximately seventy-two hours after their exercise of the contractual right to grieve, certainly raises the inference of retaliation. *See e.g., Miller v. Fairchild Industries, Inc.*, 797 F.2d 727, 731-32 (9th Cir. 1986); *Love v. Re/Max of America, Inc.*, 738 F.2d 383, 386 (10th Cir. 1984). Unfortunately for plaintiffs, they present no evidence of any comparables that could possibly raise an inference of a racial motivation in the alleged retaliation. Plaintiffs also fail to present any direct evidence of a racial motivation to defendant's action. Plaintiffs therefore fail to establish a prima facie case or retaliatory contract impairment under § 1981.

Plaintiffs do assert that there is statistical evidence in the record that establishes "an enormous history of racial animus and disparate treatment" at defendant's work place. Statistical evidence is usually used in disparate impact cases; however, under certain circumstances, a plaintiff may utilize statistical evidence to establish the inference of racial motivation in a disparate treatment case. To establish such an inference, the statistics must "show a significant disparity and eliminate the most common nondiscriminatory explanations for the disparity." *Barnes v. GenCorp Inc.*, 896 F.2d 1457, 1466 (6th Cir. 1990).

Other than baldly stating that statistical evidence in the record establishes this inference, plaintiffs neither come forward with this evidence in their opposition brief nor eliminate any common nondiscriminatory reasons for this alleged disparity. Plaintiffs have an affirmative duty at this juncture to "set forth specific facts showing that there is a genuine issue for trial." Other than generally referring to the record in this case (which is eight volumes long) plaintiffs have not done so with respect to the statistical evidence. As stated previously by the Sixth Circuit: "A trial court is not required to speculate on which portion of the record the non-moving party relies, nor is there an obligation to wade through the record for specific facts." *United States v. WRW Corp.*, 986 F.2d 138, 143 (6th Cir.

1993)(citations and quotations omitted). This Court is likewise not required to scour the record in this case searching for an issue of material fact. *See Guarino v. Brookfield Twp. Trustees*, 980 F.2d 399, 405 (6th Cir. 1992). Upon a careful reviews of the evidence properly before the Court and viewing the record in the light most favorable to plaintiff, the Court finds that there exists no genuine issue of material fact. Plaintiffs have failed to establish a prima facie case of retaliatory contractual impairment under 42 U.S.C. § 1981, and defendant is entitled to judgment as a matter of law.

Finally, the Court notes that, even if plaintiffs has established a prima facie case of retaliatory impairment, defendant has come forward with evidence of a legitimate, non-discriminatory reason for plaintiffs' discharges. Defendant argues that plaintiffs were discharged because of their accumulated work records and because they disobeyed direct orders to attend their second set of disciplinary hearings on September 26.

There is no dispute that plaintiffs were directly ordered to attend their hearings. Defendant also points to employee Sedelbauer who, like the plaintiffs, also refused several direct orders to attend his disciplinary hearing that same day. Like the plaintiffs, Sedelbauer was also "on the clock" and had a duty to obey orders. Like the plaintiffs, Sedelbauer was discharged for his accumulated work record and for disobeying a direct order. Unlike the plaintiffs, Sedelbauer is white. This like-treatment of a Caucasian for misconduct comparable to plaintiffs sufficiently supports defendant's assertion that plaintiffs were disciplined for legitimate, non-discriminatory reasons.

Defendant's treatment of the other two employees scheduled for disciplinary hearings that day, Bradley and Swartzfager, does not create an issue as to this legitimate non-discriminatory reason. Bradley had the day of the

hearing off; thus, he was neither on the clock nor was he ordered to attend the hearing. Swartzfager was on the clock, but obeyed the order to attend the hearing; thus, neither Swartzfager nor Bradley engaged in conduct comparable to that of plaintiffs.

Had plaintiffs been able to establish a prima facie case under § 1981, defendant's proffered legitimate, nondiscriminatory reason for plaintiffs' terminations would rebut any inference of a discriminatory animus on the part of defendant. Plaintiffs argue that Sedelbauer was a "sacrificial lamb" to cover the defendant's discriminatory motivation. Plaintiffs offer no evidence to support this bald assertion; however, the court finds no evidence in the record to sustain such a conclusion. As plaintiffs come forward with no evidence which would support a jury finding that the proffered, non-discriminatory reasons for plaintiffs' discharges were a pretext to cover defendant's retaliatory and racial motivation, defendant is entitled to judgment as a matter of law on this basis as well.[7] *See e.g. Hicks,* 113 S.Ct. at 2747-49.

THEREFORE, for the foregoing reasons, good cause appearing, it is

ORDERED that defendant's motion for summary judgment be, and hereby is, GRANTED.

S/
Sr. United States District Judge

[7]Because of the Court's disposition of plaintiffs' claims, it need not address defendant's estoppel argument.

[Sept. 22, 1995]

No. 3:86CV7955
IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

JAMES T. HARVIS, JR., et al.,
Plaintiffs,

v.

ROADWAY EXPRESS, INC.,
Defendants.

ORDER

POTTER, J.:

This cause is before the Court on plaintiffs' motion for reconsideration, defendant's opposition, and plaintiffs' reply. Plaintiffs ask the court to reconsider its grant of summary judgment in favor of the defendant on May 25, 1995.

For the reasons set out in defendant's opposition, plaintiffs' motion will be denied. This Court takes this opportunity, however, to comment upon plaintiffs' motion for reconsideration. In plaintiffs' opposition to defendant's motion for summary judgment and at oral argument over that motion, plaintiffs raised a new contractual right theory of recovery. In the court's order of May 25, it observed:

> [t]his case is now nine years old. Plaintiffs never pleaded nor alleged nor even mentioned in passing this theory of recovery when the case was before the Court initially. It was also not argued before the Sixth Circuit, and was not even raised in plaintiff's brief in opposition to defendant's motion for

> summary judgment. There comes a time in the life of a case when a litigant must settle on a theory or theories of recovery and stick to it; that is a primary tenet of the notice pleading theory of the Civil Rules. Defendant first received notice of this theory of recovery at oral argument on defendant's motion for summary judgment, nine years after the inception of this case. Defendant is entitled to summary judgment on this claim on this basis alone.

The Court then, in the alternative, went on to hold on the merits that plaintiff could not recover on the theory in question.

Despite the quoted admonishment, plaintiffs' counsel, in his motion for reconsideration, raises several new contractual rights that were allegedly asserted by the plaintiffs that allegedly led to their retaliatory discharge. These rights were either casually mentioned and then abandoned by plaintiffs at oral argument or are entirely new. Similarly, plaintiffs' counsel now comes forward with facts that, while presumably known to counsel prior to summary judgment, were inexplicably not offered in plaintiffs' opposition.

None of these new contractual right theories now dilatorily offered facts are a proper basis for reconsidering the Court's summary judgment order. *See, Dana Crop. v. United States*, 764 F.Supp. 482, 488-89 (N.D. Ohio 1991).

THEREFORE, for the foregoing reasons, good cause appearing, it is

ORDERED that plaintiffs' motion for reconsideration be, and hereby is, DENIED.

/s/
Sr. United States District Judge

[November 30, 1988]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

John T. Harvis, Jr., et al.,

Plaintiffs, Case No. C86-7955

- vs -

Roadway Express, Inc.,
et al.,

Defendants. MEMORANDUM AND ORDER

POTTER, J.:

This cause is before the Court on motions for summary judgment filed by defendant Roadway Express, Inc. (Company) and defendant Teamsters, Local 20 (Union), plaintiffs' opposition, defendants' replies, plaintiffs' response to new matters and defendant Union's reply. The three plaintiffs in this action are black and were employed as mechanics by defendant Company. Plaintiffs' claims arise from their discharges. Plaintiffs' first cause of action is a hybrid section 301/duty of fair representation claim against both defendants. Plaintiffs' second cause of action for race discrimination is only asserted against defendant Company.

> Under the Federal Rules of Civil Procedure, summary judgment is proper only where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The Supreme Court has recently stated that the inquiry is "where the evidence presents a sufficient disagreement to require submission to a

> jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 06 S. Ct. 2505, 2512 (1986).... In reviewing a motion for summary judgment, however, all inferences "must be viewed in the light most favorable to the party opposing the motion." *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*. 106 S. Ct. 1348, 1356-57 (1986) (quoting *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962).

Ralph Shrader, Inc. v. Diamond International Corp., 833 F.2d 1210, 1213 (6th Cir. 1987).

The party moving for summary judgment "always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits if any, which [he] believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The substantive law of the case identifies which facts are material. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1988). Therefore, only disputes of facts affecting the outcome of the suit under the applicable substantive law will preclude the entry of summary judgment. *Id.* A moving party may discharge its burden "by 'showing' - that is, pointing out to the district court - that there is an absence of evidence to support the nonmoving party's case." *Celotex*, 477 U.S. at 324-325. Where the moving party has met its initial burden, the adverse party "must set forth specific facts showing that the is a genuine issue for trial." *Anderson*, 477 U.S. at 250. "[P]laintiff, to survive the defendant's motion, need only present evidence from which a jury might return a verdict in his favor." *Id.* at 257.

Defendant Union's claim that plaintiff Harvis' suit is barred by the statute of limitations is not well taken. The Court finds the action was filed by Harvis within six months. The Court will next address the motions for summary judgment on plaintiffs' hybrid section 301/duty of fair representations claim. Specifically, the Court will consider whether the Union breached its duty of fair representation to plaintiffs. "A breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith." *Vaca v. Sipes*, 386 U.S. 171, 190 (1967). "A union's conduct may be sufficiently arbitrary to establish a breach of its duty to fairly represent its members when it handles a grievance in a 'perfunctory' manner, with caprice or without rational explanation." *Poole v. Budd Co.*, 706 F.2d 181, 183 (6th Cir. 1983). A plaintiff may establish a breach of the union's duty by evidence of personal hostility or bad faith. *Whitten v. Anchor Motor Freight, Inc.*, 521 F.2d 1335, 1340-1341 (6th Cir. 1975).

Defendant Union has set forth facts which, if uncontroverted, would entitle it to summary judgment as to all plaintiffs on the claim for breach of duty of fair representation. In effect, the Union has demonstrated that plaintiffs' case lacks evidence from which the court could find in their favor on this claim. The claims of all three plaintiffs involve their discharge from employment with the defendant Company. Grievances were filed in each plaintiff's case and each grievance was processed through final and binding arbitration in accordance with the collective bargaining agreement. The record in this case is voluminous. It includes hundreds of pages of briefing and thousands of pages of deposition testimony and exhibits. Despite this extensive record, plaintiffs have failed to present any evidence of arbitrariness, discrimination or bad faith in the processing of their grievances.

Plaintiffs argue that the Union officers who

represented them were hostile to plaintiffs because they were members of a dissident faction within the Union. Plaintiffs contend that this hostility was transferred to them during the grievance proceedings. Plaintiffs have presented no evidence in support of their contentions. To the contrary, each plaintiff testified in his deposition that the Union representative handling his grievance exhibited no personal hostility toward him. Plaintiffs claim that their grievances were arbitrated in a perfunctory manner is also unsupported by any evidence. Plaintiffs have failed to present specific facts creating a genuine issue of material fact in opposition to the Union's motion for summary judgment. Plaintiffs have not shown that the Union failed to take any reasonable step in processing their grievances through arbitration or that any complaint they have with the Union's handling of their grievances could have had a material impact on their outcome.

Plaintiffs continue to assert that the Union's failure to process race discrimination claims through the grievance machinery is a breach of its duty, despite this matter having already been adjudicated in this case. This claim is not well taken for the reasons set forth in the magistrate's Report and Recommendation filed June 6, 1988. The holding in *Farmer v. ARA Services, Inc.*, 660 F.2d 1096 (6th Cir. 1981) is not as broad in scope as plaintiffs suggest. The defendant union in that case was found to have breached its statutory duty based upon the facts found by the trial judge. Plaintiffs in this case have produced no evidence from which it could be determined that their situation was factually similar to *Farmer*. In sum, there is no material fact as to the duty of fair representation claim, and the Union is entitled to prevail as a matter of law on the claims of all three plaintiffs.

Plaintiffs assert that they are entitled to prevail on their hybrid section 301/duty of fair representation claim even if they cannot establish the breach of the Union's duty. The Court believes this assertion is contrary to the well

established law as set forth in *DelCostello v. Teamsters*, 462 U.S. 151 (1983).

> The suit against the employer rests on §301, since the employee is alleging a breach of the collective bargaining agreement. The suit against the union is one for breach of the union's duty of fair representation, which is implied under the scheme of the National Labor Relations Act.
>
> "Yet the two claims are inextricably interdependent. 'To prevail against either the company or the Union, . . . [employee-plaintiffs] must not only show that their discharge was contrary to the contract but must also carry the burden of demonstrating breach of duty by the Union.'" *Mitchell, supra*, at 66-67 (Stewart, J., concurring in judgment), quoting *Hines, supra*, at 570-571. The employee may, if he chooses, sue one defendant and not the other; but the case he must prove is the same whether he sues one, the other, or both.

Id. at 164-165. It is clear that plaintiffs may not maintain this claim against the Company where the Court has determined that the Union is entitled to summary judgment.

Nor may plaintiffs directly attach the arbitration awards adjudicating their grievances in this action. It is not the award itself which is at issue in this case, but the conduct of the parties to the arbitration. For this reason also, the issue regarding the applicable collective bargaining agreement is not an issue of material fact. This Court has already held that the decisions of the arbitral committee are final and binding on the parties in this case in its order of May 24, 1988. For example, plaintiffs' complaint does not allege a cause of action to set the awards aside, pursuant to the Arbitration Act, 9 U.S.C. §1, *et seq.*, under which the court could engage in a narrow, but direct review of the final

decision of the arbitral committee. The Court does not determine whether plaintiffs would have standing to bring such an action, but only illustrates the contrast between this case and an action brought to set aside an award. Thus, the final decision must stand as to all parties, and plaintiffs' hybrid section 301/duty of fair representation claim will be dismissed.

Plaintiffs' remaining claims are against the defendant Company for race discrimination under 42 U.S.C. §1981 and Title VII. The Company contends that plaintiffs are barred from litigating these claims because of the final and binding arbitration decisions. The showing required to prevail under either statute is essentially the same. *Murray v. Thistledown Racing Club, Inc.*, 770 F.2d 63, 69 (6th Cir. 1985). The principles underlying Title VII and Section 1981 are essentially the same. *Benson v. Little Rock Hilton Inn*, 742 F.2d 414, 416 (8th Cir. 1984). "In sum, Title VII's purpose and procedures strongly suggest that an individual does not forfeit his private cause of action if he first pursues his grievance to final arbitration under the nondiscrimination clause of a collective bargaining agreement." *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 49 (1974). The case before the Court provides all the more reason why plaintiffs' claims under Section 1981 and Title VII should not be barred by the final arbitration decision where plaintiffs had no opportunity to litigate their race discrimination claims in the grievance procedure.

> A Title VII case of sexual discrimination must be analyzed under the three prong test articulated by the Supreme Court in *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 101 S. Ct. 1089, 67 L.Ed.2d 207 (1981) and *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L.Ed.2d 668 (1973). A plaintiff carries the burden of establishing a *prima facie* case. 450 U.S. at 252-53, 101 S. Ct. at 1093-94. If she establishes a *prima facie*

> case, the defendant must then articulate a nondiscriminatory reason for its actions. *Id.* If the employer does this, the burden is again on the plaintiff to prove that the articulated reason was pretextual and not the true reason, either by showing that a discriminatory reason was the more likely motivation, or by showing that the articulated reason is unworthy of belief. (Citations omitted.)

Mills v. Ford Co., 800 F.2d 635, 637 (6th Cir. 1986).

"The plaintiff must ultimately prove that the defendant intentionally discriminated against her. 450 U.S. at 253, 101 S. Ct. at 1093." *Id.* at 638. "Proof of the four *McDonnell Douglas* elements or other direct or statistical proof raises a rebuttable presumption of discrimination." (Footnotes omitted.) *Simpson v. Midland-Ross Corp.*, 823 F.2d 937, 940 (6th Cir. 1987).

> Establishment of the prima facie case in effect creates a presumption that the employer unlawfully discriminated against the employee. If the trier of fact believes the plaintiff's evidence, and if the employer is silent in the fact of the presumption, the court must enter judgment for the plaintiff because no issue of fact remains in the case. (Footnotes omitted.)

Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 254 (1981).

"The burden of production then shifts to the defendant employer to provide a legitimate nondiscriminatory reason for the action taken." *Simpson*, 823 F.2d at 940.

> A plaintiff can establish that the legitimate, nondiscriminatory reason for the employment

> decision articulated by the defendant employer is pretextual in one of two ways. the first is to establish by a preponderance of the evidence that the discriminatory reason was the true reason motivating the employer's conduct. Alternatively, the plaintiff can prove pretext by showing that the proffered legitimate reason was false. (Citations omitted.)

Sims v. Cleland, 813 F.2d 790, 792 (6th Cir. 1987).

Plaintiffs claim that their discharges were racially motivated. The Court determines for the purpose of this motion that plaintiffs have each established a prima facie case under Section 1981 and Title VII. Defendants assert that plaintiffs' discharges were for the legitimate nondiscriminatory reasons advanced to the arbitration committee. Plaintiffs' claim that they were discharged for violations for which similarly situated white employees have received lesser discipline or no discipline and that the defendants' reasons are pretextual. The Court has thoroughly reviewed the pleadings, affidavits, depositions transcripts and other materials filed in support of and in opposition to summary judgment. It is this Court's opinion that genuine issues of material fact exist as to plaintiffs' claims under Section 1981 and Title VII against defendant Company.

The Court has also reviewed all the pending motions in this action relating to various issues of trial management. The Court believes the issues raised in these motions are now moot in light of the foregoing opinion. This cause will now proceed to trial against the defendant Company on plaintiffs' claims of race discrimination. Plaintiffs' claims under Section 1981 will be tried to a jury and the claim under Title VII will be tried to the Court. Title VII matters not appropriate for presentation to the jury under Section 1981 will be heard out of the presence of the jury.

THEREFORE, for the foregoing reasons, good cause appearing, it is

ORDERED that the defendant Union's motion for summary judgment be, and hereby are, GRANTED; and it is

FURTHER ORDERED that defendant Company's motion for summary judgment be, and hereby is GRANTED in part and DENIED in part; and it is

FURTHER ORDERED that all pending motions be, and hereby are, DENIED as moot.

S/
UNITED STATES DISTRICT JUDGE

[Jan. 9, 1990]

No. 3:86CV7955
IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

JAMES T. HARVIS, JR., et al.,
Plaintiffs,

v.

ROADWAY EXPRESS, INC.,
Defendants.

MEMORANDUM AND ORDER

POTTER, J.:

This matter is before the court on plaintiffs' response to the Court's show cause order of July 10, 1989, defendants' reply, and plaintiffs' surreply. This Court's order of July 10, 1989 ordered plaintiffs to show cause why their claims brought pursuant to 42 U.S.C. § 1981 should not be dismissed pursuant to the Supreme court's decision in *Patterson v. McLean Credit Union*, 109 S.Ct. 2363 (1989).

The current posture of the case is such that a jury returned a verdict finding no violation of § 1981 against plaintiff James Harvis. Two days later, on June 15, 1989, the Supreme Court decided *Patterson*. Defendants contend that the *Patterson* decision should not apply retroactively to Harvis' § 1981 claim. Plaintiff, however, argues precisely the opposite. The *Patterson* decision should, according to plaintiffs, be applied retroactively to Harvis' claim, thus depriving the court of subject matter jurisdiction on Harvis' § 1981 claim. Plaintiffs contend that the Curt must as a result disregard the jury verdict rendered on Harvis' § 1981

claim and make its own findings of fact and conclusion of law with regard to Harvis' 42 U.S.C. § 2000e *et seq.* claim. Thus, the first issue before the Court is what effect the *Patterson* decision must be given regarding Harvis' § 1981 claim.

The parties have correctly pointed out that judicial decisions involving statutory interpretation are generally applied retroactively. *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971). However, under certain circumstances it is appropriate not to apply a decision retroactively. The Chevron court set forth a three-part analysis to be used in determining the nonretroactivity question. The court stated:

> In our cases dealing with the nonretroactivity question, we have generally considered three separate factors. First, the decision to be applied nonretroactively must establish a new principal of law, either by overruling clear past precedent on which litigants have relied [citation omitted] or by deciding an issue of first impression whose resolution was not clearly foreshadowed [citation omitted]. Second, it has been stressed that "we must ... weigh the merits and demerits in each case by looking at the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." [Citation omitted.] Finally, we have weighed the inequity imposed by retroactive application, for "[w]here a decision of this court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity." [Citation omitted.]

Id. at 106-107.

This Court has applied *Patterson* retroactively to cases pending before it. See e.g., *Haynes v. The Salvation Army*,

No. 3:89CV7115 (N.D. Ohio, Aug. 22, 1989) and *Hernandez v. AP Parts Co.*, No. C88-7797 (N.D. Ohio, Aug. 22, 1989). However, those cases did not involve the factual scenario of the case sub judice since no jury verdict has been returned yet on the § 1981 claims. Thus, the relevant question is whether the fact that a jury rendered a verdict on Harvis' § 1981 claim should preclude a retroactive application of *Patterson*. At least one other district court considered this issue in light of the *Chevron* nonretroactivity analysis and concluded that equity disfavors the retroactive application of Patterson to a § 1981 claim tried to a verdict before a jury. *Gillespie v. First Interstate Bank of Wisconsin Southeast*, 1989 U.S. Dist. LEXIS 8150 (E.D. Wisc. 1989). The Court agrees that to apply *Patterson* to § 1981 claims tried to a verdict before a jury would yield an inequitable result to the prevailing party, whether it be plaintiff or defendant. Accordingly, *Patterson* does not apply to Harvis' § 1981 claim and the jury verdict on the claim survives *Patterson*.

When a party has a right to a jury trial on an issue involved in a legal claim, the court is bound by the jury's determination of that issue as it relates to an accompanying equitable claim. *In re Lewis*, 845 F.2d 624, 629 (1988). Clearly, both 42 U.S.C. § 2000e *et seq*, (Title VII) and 42 U.S.C. § 1981 require proof of purposeful discrimination on the part of a plaintiff in order to prevail. *Daniels v. Board of Educ. of Ravenna City School district*, 805 F.2d 203, 207 (1986). In the case of Harvis, a jury found that intentional discrimination based on race was not a factor in his discharge. Pursuant to *Lewis*, this court is bound to follow that determination with respect to Harvis' Title VII claim and enter judgment in favor of defendant. The court is persuaded that final judgment should be entered on Harvis' claim pursuant to Rule 54(b). Harvis' claims are dissimilar to those of Rivers and Davison and thus there is no just reason for delay in entering judgment on Harvis' claims.

The second issue before the Court is whether the § 1981 claims of plaintiffs should be dismissed pursuant to *Patterson*. It should be noted that the Court concludes, pursuant to the Chevron analysis, that *Patterson* should be applied retroactively to the § 1981 claims of Rivers and Davison since they have not yet been tried to a jury.

Defendants Rivers and Davison have pled in essence that their discharges were racially motivated and thus violated § 1981. However, in Patterson the court held as follows:

> By its plain terms, the relevant provision in § 1981 protects two rights: "the same right ... to make ... contracts" and "the same right ... to ... enforce contracts." The first of these protections extends only to the formation of a contract, but not to problems that may arise later from the conditions of continuing employment. the statute prohibits, when based on race, the refusal to enter into a contact with someone, as well as the offer to make a contract only on discriminatory terms. But the right to make contracts does not extend, as a matter of either logic or semantics, to conduct by the employer after the contract relation has been established, including breach of the terms of the contract or imposition of discriminatory working conditions. Such postformation conduct does not involve the right to make a contract, but rather implicates the performance of established contract obligations and the conditions of continuing employment, matters more naturally governed by state contract law and Title VII. See *infra*, at ___.

Patterson, 109 S.Ct. at 2372-73. Since the *Patterson* decision,

this court and others[1] have concluded that § 1981 does not apply to discriminatory discharges since a discharge is conduct which occurs after the formation of a contract

Finally, although plaintiffs Rivers and Davison contend that they were discharged in retaliation for exercising their grievance procedure rights, the Court is not persuaded that the complaint continues to state a claim upon which relief can be granted in light of *Patterson*. Other district courts have considered similar issues and concluded that claims that a plaintiff was discharged in retaliation for exercising rights still protected under § 1981 do not state a claim under § 1981 in light of *Patterson*. *Dangerfield, et al. v. The Mission Press*, 1989 U.S. Dist. LEXIS 8985 (N.D. Ill. 1989)(holding that a retaliatory discharge for filing EEOC complaint was no longer actionable under § 1981); *Hall*, 1989 U.S. Dist. LEXIS 9661 (N.D. Ill. 1989)(holding that discharge for complaints about discrimination not actionable). In this case plaintiffs Rivers and Davison contend that they were discharged in retaliation for prevailing in a grievance hearing. However, such a "bootstrapping" of the actual breach of contract claim into a claim that plaintiffs were deprived of the right to enforce the contract was rejected in *Patterson*. *Id.* at 2376. Plaintiffs concede that "the claim of denial of access to those grievance and judicial forums is not the claim here." Plaintiffs' Reply at 6. Ironically, the denial of access to such forums is precisely what is protected under the "right to ... enforce contracts" provision of § 1981. Plaintiffs Rivers and Davison have been free to grieve or litigate their discharges in the appropriate forums. Thus, their complaint fails to allege that they have been deprived of their § 1981 rights. Accordingly, the § 1981 claims of Rivers and Davison will be

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[1]See *Williams v. National Railroad Passenger Corp.*, 1989 U.S. Dist. LEXIS 8859 (D. D.C. 1989); *Hall v. County of Cook*, 1989 U.S. Dist. LEXIS 9661 (N.D. Ill. 1989); *Haynes, supra, Hernandez, supra*.

dismissed.

THEREFORE, for the foregoing reasons, good cause appearing, it is

ORDERED that judgement be, and hereby is, entered in favor of defendant on plaintiff Harvis' 42 U.S.C. § 2000E *et seq.* and 42 U.S.C. § 1981 claims; and it is

FURTHER ORDERED that the 42 U.S.C. § 1981 claims of plaintiffs Rivers and Davison be, and hereby are DISMISSED.

/S/
United States District Judge

[Oct. 18, 1990]

No. 3:86CV7955

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

JAMES T. HARVIS, JR., et al.,
Plaintiffs,

v.

ROADWAY EXPRESS, INC.,
Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

POTTER, J.:

This cause came on for trial on plaintiffs Robert C. Davison and Maurice Rivers' complaint alleging that they were discriminated against on the basis of race in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (Title VII). In an order dated March 14, 1989, this Court separated the trial of plaintiff Harvis from the trial of plaintiffs Rivers and Davison. The trial of plaintiff Harvis ended in a jury verdict in favor of defendant Roadway Express, Inc. (Roadway) on June 13, 1989. Since plaintiffs Rivers and Davison alleged only violations of Title VII and, hence, were not entitled to have their claims heard by a jury, their case was tried upon the facts without the jury. Roadway is the only defendant which plaintiffs proceeded against at trial. The extensive briefing done by the parties has resulted in the Court having before it plaintiffs' pre-trial proposed findings of fact and conclusions of law, defendant's pre-trial proposed findings of fact and conclusions of law, defendant's post-trial proposed findings of fact and

conclusions of law and plaintiffs' oppositions thereto, and plaintiffs' post-trial proposed findings of fact and conclusions of law and defendant's opposition thereto. The Court has considered these materials and makes the following findings of fact and conclusions of law.

Preliminarily, the Court denies defendant's motion to dismiss plaintiffs' amended complaint (Doc. Nol. 282) for two reasons. First, this motion was filed out of time. On September 11, 1989, the Court issued a pre-trial order setting the trial of this cause to commence on February 27, 1990. Among other things, this Order also set the motion practice cut-off date at eight weeks prior to trial. Defendant's instant motion was filed February 28, 1990, the day of trial. for this reason alone, the Court would deny the motion. However, defendant's motion asks this Court to dismiss plaintiffs' claims under Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction. Since this Court may reexamine subject matter jurisdiction at any point in the proceedings, it has examined the merits of defendant's motion. In doing so, the Court finds the motion not well taken.

Defendant contends that plaintiffs failed to assert their Title VII claims within 90 days after the EEOC notified plaintiffs of their right to bring suit. Assuming that the right-to-sue letter was issued June 30, 1987, as defendant alleges, plaintiffs attempted to bring suit on these claims by moving for leave to amend their complaint on September 29, 1987. Clearly, plaintiffs' motion for leave to amend evidenced plaintiffs' intent to bring suit under Title VII. Defendant can claim no prejudice by the apparent confusion which resulted in plaintiffs' filing the amended complaint on October 18, 1988. Therefore, the Court has jurisdiction to address the merits of the case, and defendant's motion will accordingly be denied.

FINDINGS OF FACT

1. Plaintiffs are black male citizens of the United States and reside within the territorial jurisdiction of this Court.

2. Defendant does business in toledo, Ohio and is an employer within the meaning of 42 U.S.C. § 2000(b).

3. Plaintiffs began working for Roadway in 1972 in Akron, Ohio. Rivers began working on the dock, while Davison began working in the garage. Both plaintiffs transferred to the Roadway facility in Toledo, Ohio in 1975.

4. Roadway Garage Manager Ed Guy and Union business Agent Paul Toney agreed upon august 20, 1986 as the date on which a hearing would be held to discuss Davison's accumulated work record. On August 15, 1986, a letter was sent out to confirm this date. The hearing was postponed and rescheduled for August 22, 1986 by agreement between Mr. Guy and Mr. Toney.

5. Paul Toney was the union representative who was responsible for scheduling disciplinary hearings with defendant. Mr. Toney testified that he would mislead and even lie to Roadway in his attempts to stall hearings in the hope of resolving the matter on an informal basis. Mr. toney used this procedure for a number of employees, both black and white.

6. Toney testified that he believed that some time prior to August 22, 1986 Guy became award of his stalling tactics and his history of avoiding disciplinary hearings. Plaintiffs were employees for whom Toney had employed such tactics. As a result, Guy demanded that a disciplinary hearing occur within 72 hours of the request. This procedure was a proper notification procedure due to a 1971 ruling.

7. On the morning of August 22, 1986 at approximately 7:30 A.M., Davison was told by foreman Bill Thompson that there was going to be a disciplinary hearing concerning Davison. Davison was told to go to the office and complied. When he arrived at the garage office,

Davison told Guy that he had not received a letter in the mail informing him of a hearing and the [sic] he would not attend the hearing. Guy told Davison that he had received the proper notice for the hearing and that the hearing would be held whether he was there or not. Davison then left the office.

8. Davison was subsequently informed by Toney that he had received a two-day suspension as a result of the hearing that was conducted in his absence. That suspension was based on Davison's accumulated work record.

9. Davison filed a grievance alleging that his suspension was without just cause and without proper notification.

10. Guy and Toney also agreed upon August 20, 1986 as the date on which a hearing would be held to discuss Rivers' accumulated work record. On August 15, 1986, a letter was sent to confirm this date. That hearing was postponed and rescheduled for august 22, 1986 by agreement between Guy and Toney.

11. In the early morning of August 22, 1986, Roadway's supervisor Bill Thompson told Rivers that he had head Rivers was having a disciplinary hearing later that day. Rivers stated that he had not received a letter notifying him of a hearing on August 22 and that as far as he was concerned no hearing would take place.

12. At approximately 7:30 A.M. on the morning of August 22, a Roadway foreman approached Rivers and told him to go to the office for a hearing. Although Rivers went to the office, he informed Guy that he had not received proper notice of the hearing. Although Rivers' Union Business Agent was present, Rivers replied that he did not think he should be there for the hearing and he was not properly represented. While Rivers claims was excused, the court finds that he was not.

13. Rivers subsequently received a letter from Roadway dated August 22, 1986 which indicated that as a result of a hearing on his accumulated work record, he was given a two-day suspension.

14. Rivers filed a grievance alleging that his suspension was without just cause and without proper notification.

15. The Toledo Local Joint Grievance Committee (TLJGC) convened and heard both grievances on September 23, 1986. During the hearings, plaintiffs argued that they had not received proper notice for their disciplinary hearings, that if they had received proper notice they would have been present at their disciplinary hearings, and that white employees Sedelbauer, Bradley and Swartzfager should have had disciplinary hearings scheduled before plaintiffs as Roadway had requested hearing dates for those three individuals prior to requesting hearing dates for plaintiffs. Both grievances were granted based upon " improprieties," and both plaintiffs were awarded two days of back pay.

16. Disciplinary hearings has been requested for Swartzfager on June 6, 1986, Davison on July 14, 1986, Rivers on August 1, 1986, Sedelbauer on August 8, 1986 and for Bradley on August 11, 1986. Swartzfager had a disciplinary hearing scheduled for July 9, 1986 which did not occur as he was on vacation that week. Union Steward Eugene McCord was instrumental in the postponement of Swartzfager's hearing as he informed Guy on several occasions that Swartzfager's attendance record was not that bad and a hearing was not necessary.

17. Based upon these facts and the credible testimony of Dr. Cranny, black employees were not treated differently than white employees with respect to the scheduling of disciplinary hearings.

18. Shortly after the decision of the TLJGC was announced, Roadway's Labor Relations Manager James O'Neill announced there would be disciplinary hearings on employees Rivers, Davison, Bradley, Sedelbauer and Swartzfager within 72 hours. Both plaintiffs were present when O'Neill announced the upcoming hearings. Davison responded that he could not attend as he had a doctor appointment, and McCord responded that he could not attend as it was his day off. After some discussion, O'Neill

and Toney agreed upon the date of September 26, 1986 at 7:00 A.M. for the hearings.

19. The race of Swartzfager, Sedelbauer and Bradley is white.

20. On September 25, 1987, Broadway supervisor Robert Kresge delivered and read a written notice of hearing to Davison at work which stated that a hearing would be held for him on September 26, 1986 at 7:00 A.M. and asked him to sign a receipt acknowledging his upcoming hearing. Davison spoke with McCord and refused to sign the paper. Kresge left the written notice on a tool box next to Davison. Davison claims that the notice was not read to him and that he was not notified of the hearing date and time. McCord, however, testified that Kresge read the notice to Davison. Based on this testimony, the court finds that Davison was told on the morning of September 25, 1986 that a disciplinary hearing would be held for him on September 26, 1986.

21. On September 26, 1986, Toney informed Davison that Davison should attend the hearing because he had been given a direct order to do so and that Davison could be discharged if he did not attend the hearing. Davison maintained that he had not received the proper notice.

22. Davison was then approached by Roadway supervisors Broone and Gates who ordered him to go to the office for a hearing. Davison proceeded toward the office but stopped to talk to Toney and McCord.

23. Kresge approached Davison, in the presence of McCord and Toney, and again ordered him to go into the office, but Davison replied, "I'm talking to Paul, get out of my face." After some time elapsed, Davison walked into the office.

24. Once in the office, a heated discussion ensued between McCord, O'Neill, and Davison about whether the hearing should take place. Davison was informed that he could be discharged if he did not attend the hearing. Twenty-five minutes elapsed while the parties discussed

whether or not to proceed. Finally, O'Neill told Kresge to start the hearing. Kresge started the hearing, and Davison and McCord left the office and returned to work.

25. On September 25, 1986 Rivers was approached by Kresge, who delivered and read to Rivers a written notice of hearing for September 26, 1986 and asked Rivers to sign a form acknowledging that a hearing would be held the next day. McCord, who was present at the time, told Rivers that he was not obligated to sign the form. Rivers refused to sign or take the document acknowledging that a hearing would be held the next day.

26. Shortly after 7:00 A.M. on September 26, 1986, Roadway Supervisors Broome and Gates approached Rivers at work. Broome ordered Rivers to go into the office because Roadway was going to have a disciplinary hearing concerning his accumulated work record.

27. After discussing this matter with toney, Toney informed Rivers that failure to attend the hearing could result in discharge.

28. Kresge then went to the garage break room where Rivers was speaking with McCord and Toney, told them that the hearing was ready to begin and order Rivers to attend the hearing.

29. Later O'Neill approached rivers, Mccord nd toney and stated that the Company was ready to begin the hearing. Rivers, Toney and McCord went into the office. After O'Neill began the hearing, Rivers walked out.

30. Similarly, on September 25 and 26, 1986, Sedelbauer was directly ordered numerous times by various Roadway supervisors to attend a hearing on his accumulated work record scheduled for September 26, 1986.

31. Sedelbauer, like rivers and Davison, refused those direct order to attend his disciplinary hearing on September 26, 1986.

32. Swartzfager was also given direct orders to attend a disciplinary hearing to be held on September 26, 1986. Swartzfager complied with those orders and attended the disciplinary hearing. Swartzfager was given a disciplinary

record of hearing but did not receive any other disciplinary time off without pay.

33. Throughout the time of these events on September 26, 1986, Rivers, Davison, Sedelbauer and Swartzfager were punched in and on the clock at work. As such, they were obliged to follow the orders of their supervisors unless the orders required unsafe actions.

34. rivers was discharged on September 26, 1986 for refusing several direct orders and for his accumulated work record. Rivers was not discharged because of his race.

35. Davison was discharged on September 26, 1986 for refusing several direct orders and for his accumulated work record. Davison was not discharged because of his race.

36. Sedelbauer was discharged on September 26, 1986 for refusing several direct orders and for his accumulated work record.

37. The only employee to comply with the direct orders of management, Swartzfager, was not discharged on September 26, 1986 but was given a disciplinary record of hearing.

38. The greater weight of the evidence clearly demonstrates that there was no pattern or practice of different treatment of blacks from whites at Roadway's Toledo garage. From the statistical evidence introduced by defendant, the Court finds that blacks and whites were treated equally in the assignment of job duties and the scheduling of disciplinary hearings.

Conclusions of Law

1. This court has jurisdiction over the parties and subject matter of this action pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-5(f) and 28 U.S.C. § 1331.

2. The Court does not judge the correctness of the defendant's business decision. *Cooper v. North Olmstead*, 795 F.2d 1265, 1271-72 (6th Cir. 1986); *Dale v. Chicago*

Tribune Co., 797 F.2d 458, 464 (7th Cir. 1986).

3. The disparate treatment theory of discrimination is the proper framework for analysis. *Kent County Sheriff's Ass'n v. county of Kent*, 826 F.2d 1485, 1492-93 (6th Cir. 1987), *rehearing denied*, 835 F.2d 1146 (6th Cir. 1987).

4. The United States Supreme Court outlined the appropriate analysis of disparate treatment claims in *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981), and *U.S. Postal Service Board of governors v. Aikens*, 460 U.S. 711 (1983). According to Burdine, plaintiffs must first establish a prima facie case of intentional discrimination, which defendant can rebut by producing a legitimate, nondiscriminatory reason for the discharge. "The defendant need not persuade the court that it was actually motivated by the proffered reasons. . . . It is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff." *Burdine*, 450 U.S. at 254-55. If defendant meets this burden of production, plaintiffs must then prove that defendant's asserted motive is pretextual. The need to prove pretext merges with plaintiffs' ultimate burden of persuading the Court that he was the victim of intentional discrimination, a burden that plaintiffs retain at all times. *Id.* at 254-56. In *Aikens*, the Court held that if the trial judge denies defendant's motion for dismissal after completion of plaintiffs' case-in-chief and if defendant offers evidence in support of nondiscriminatory reasons for its action, the *Burdine* presumption "drops from the case" and "the factual inquiry proceeds to a new level of specificity." *Aikens*, 460 U.S. at 715. "The question than becomes for the trial judge, *Aikens* holds, whether plaintiff has carried the burden of persuasion of showing intentional discrimination, as would be true in other civil litigation." *Weems v. Ball Metal & Chemical Div., Inc.*, 753 F.2d 527, 529 n.2 (6th Cir. 1985).

5. The Court finds that plaintiffs made out a prima facie case of disparate treatment. The elements of a prima facie case applicable to the fact situation presented

here are as follows. First, plaintiffs must show that they are members of a class entitled to protection under the Civil Rights Act. Second, plaintiffs must show that they were subjected to adverse employment action. Third, plaintiffs must show that they qualified for their respective positions. Finally, plaintiffs must show that the employer either continued to solicit applications for the vacant positions or replaced plaintiffs with persons not within the protected class. *McDonnell Douglas v. Green*, 411 U.S. 792, 802 (1973); *Gagne v. Northwestern Nat. Inc. Co.*, 881 F.2d 309, 313 (6th Cir. 1989); *Jackson v. RKO Bottlers of Toledo, Inc.*, 743 F.2d 370, 375 (6th Cir. 1984). In an appeal from this Court, the Sixth Circuit cautioned that a "[p]laintiff's burden with respect to establishing a prima facie case is not onerous." *Jackson*, 743 F.2d at 377. Plaintiffs have satisfied the second element through the introduction of proof that they were terminated. Defendant has not contended that plaintiffs were not qualified for their respective positions. Nor has defendant contended that it did not fill the positions that plaintiffs occupied. Therefore, the Court finds the third and fourth elements met.

6. In the present case, plaintiffs must prove not only that they were treated differently than the defendant's white employees, but also that this disparate treatment was the result of a discriminatory intent. *Smith v. Pan Am World Airways*, 706 F.2d 771, 773 (6th cir. 1983). "The ultimate question to be resolved is whether the employer intentionally treated 'some people less favorably than others because of their race,' *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 335, n.15 (1977), not whether the employer treated an employee less favorably than someone's general standard of equitable treatment." *Batts v. NLT Corp.*, 844 F.2d 331, 337 (6th Cir. 1988).

7. Plaintiffs have failed to carry their burden of proving by a preponderance of the evidence that their discharge was racially discriminatory. Plaintiffs have had their day in court. After weighing the testimony of the witnesses and considering all of the evidence, the Court

finds that plaintiffs did not carry their ultimate burden of proof. Defendant has articulated legitimate, nondiscriminatory reasons for discharging plaintiffs, i.e., their repeated refusal to obey direct orders. Plaintiffs have failed to demonstrate that defendant's proffered reasons for their discharge were pretextual. Under the substantive standards applicable to Title VII cases, plaintiffs have not established that they were discharged from employment based upon their race.

THEREFORE, for the foregoing reasons, good cause appearing, it is

ORDERED that defendant's motion to dismiss be, and hereby is, DENIED; and it is

FURTHER ORDERED that judgment be, and hereby is, entered in favor of defendant Roadway Express, Inc. and against plaintiffs Maurice Rivers and Robert Davison.

_____

United States District Judge

[Aug. 24, 1992]

No. 91-3348

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JAMES T. HARVIS, JR., et al.,
Plaintiffs-Appellants,

v.

ROADWAY EXPRESS, INC.,
Defendant-Appellee.

BEFORE: GUY, BOGGS and SILER,
Circuit Judges.

BOGGS, Circuit Judge.

In this race discrimination case, the appellants originally claimed they were discharged because of racial discrimination and now state that the claim was also for retaliatory discharge for winning a grievance, exercised for racial reasons. The claim was dismissed by the district court based upon the United States Supreme court ruling in *Patterson v. McLean Credit Union*, 491 U.S. 164, 109 S.Ct. 2363, 105 L.Ed.2d 132 (1989). On appeal, appellants argue that the district court misapplied *Patterson*, but that even if their claim had been properly dismissed, this court should reinstate their claim by retroactively applying to this case the new Civil Rights Act of 1991 (CRA of 1991), Pub. L. No. 102-166, 105 Stat. 1071-1100, 42 U.S.C. S 1981, which explicitly enacted the interpretation of § 1981 rejected in *Patterson*. We reverse on the grounds that the district court misapplied *Patterson* to dismiss appellants' retaliatory discharge claim. We affirm the district court's dismissal of the race discrimination in firing claim, and hold that the CRA of 1991 should be not applied retroactively to this case.

I

Plaintiffs-appellants Maurice Rivers and Robert C. Davison are Black garage mechanics who were employed by defendant Roadway Express, Inc. since 1972 and 1973 respectively. On the morning of August 22, 1986, Roadway verbally informed Rivers and Davison that they were required to attend disciplinary hearings that same day related to their accumulated work record. Both plaintiffs refused to attend, alleging inadequate notice. Roadway was contractually required to provide prior written notice of such hearings and allegedly routinely did so for white employees. The hearings resulted in two-day suspensions for both appellants. Appellants filed grievances with the Toledo Local Joint Grievance Committee (TLJGC), which granted the grievances based on "improprieties" and awarded each appellant two days of back pay.

Shortly after these initial hearings, disciplinary hearings were again called by Roadway's Labor Relations Manager, James O'Neill, who announced that he would hold disciplinary hearings against Rivers and Davison within seventy-two hours. Rivers and Davison again refused to attend, claiming inadequate notice. As the result of the hearings, both Rivers and Davison were discharged on September 26, 1986, for refusing several direct orders to attend the hearings and for their accumulated work record.

In February 1987, Rivers and Davison, along with Jams T. Harvis, filed this suit, alleging that Roadway discriminated against them on the basis of race, in violation of 42 U.S.C. § 1981 and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. They also alleged that Roadway violated the Labor Management Relations Act of 1947 (LMRA), 29 U.S.C. § 185(a), and brought an unfair representation claim against their union. Both of these latter claims were dismissed on summary judgment by the district court.

The district court then separated Harvis's case, which went to trial and ended in a jury verdict on the § 1981 claim for Roadway. The district court ordered judgment against Harvis on his § 1981 and Title VII claims. Harvis' appeal to this court was denied and the trial court's judgment affirmed. *Harvis v. Roadway Express, Inc.*, 923 F.2d 59 (6th Cir. 1991).

On June 15, 1989, shortly after Harvis's verdict and before appellants went to trial, the Supreme Court decided *Patterson v. McLean Credit Union*, 491 U.S. 164, 109 S.Ct. 2363, 105 L.Ed.2d 132 (1989), which held that the right to make contracts protected by § 1981 does not apply to conditions of employment, but only covers discrimination in the formation of the employment contract or the right to enforce the contract. The district court, while holding that *Patterson* was not retroactive with respect to Harvis's jury verdict, held it did have retroactive effect on the untried and pending § 1981 claims of Rivers and Davison. The district court concluded that appellants' claims were for discriminatory discharge and thus, based on *Patterson*, could not be maintained under § 1981. Rivers and Davison argued that their claims were not simply for discriminatory discharge, but rather for retaliation for their success in enforcing contract rights in a grievance hearing. However, the district court held that these were only basic breach of contract claims, and not claims based on the right to enforce contracts,which would fall under § 1981. After dismissing the § 1981 claims, the district court held a bench trial on plaintiffs' Title VII claims and ruled in favor of Roadway, holding that Rivers and Davison failed to establish that their discharge from employment was base upon their race.

Rivers and Davison appeal the district court's dismissal of their § 1981 claims on two grounds. First, they argue that *Patterson* does not preclude this action, as it is not an action for discriminatory discharge, but rather an action based on retaliation for attempting to enforce the

labor agreement, thus squarely falling under § 1981. Second, while this appeal was pending, the CRA of 1991 was enacted, explicitly contradicting the *Patterson* decision. Appellants argue that the CRA of 1991 should be applied retroactively to their § 1981 claims, thus invalidating the district court's decision. The case, they argue, should be remanded for a new determination under this new legislation.

II

42 U.S.C. § 1981 provides:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

The *Patterson* court limited the scope of § 1981 actions by holding that § 1981 does not apply to discrimination in conditions of employment, but only prohibits discrimination in the formation of the employment contract or the right to enforce the contract. *Patterson*, 491 U.S. at 176, 109 S.Ct. at 2372. Thus, under *Patterson*, § 1981 "covers only conduct at the initial formation of the contract and conduct which impairs the right to enforce contract obligations through legal process." *Id.* at 179, 109 S.Ct. at 2374.

While *Patterson* did not directly address the issue of whether § 1981 applied to discriminatory discharges, this court, along with a majority of other courts, had held that claims of discriminatory discharge are no longer cognizable

under § 1981 because discharge does not involve contract formation. *See Prather v. Dayton Power & Light Co.*, 918 F.2d 1255 (6th Cir. 1990), *cert. denied*, __ U.S. __, 111 S.Ct. 2889, 115 L.Ed.2d 1054 (1991); *Hull v. Cuyahoga Valley Bd. of Educ.*, 926 F.2d 505 (6th Cir. 1991), *cert. denied*, __ U.S. __, 111 S.Ct. 2917, 115 L.Ed.2d 1080 (1991). The plaintiffs, below and on appeal, argue that theirs were not discriminatory discharge claims, but rather, claims of retaliatory discharge where plaintiffs were punished for attempting to enforce their contract rights to be treated equally with white people. The district court rejected this claim as "bootstrapping" and held that this was solely a discriminatory discharge case.

Before deciding whether or not *Patterson* was correctly applied, we must first address whether the district court was correct in retroactively applying *Patterson* to the claims of Rivers and Davison. Our circuit has twice held that *Patterson* does apply retroactively to pending cases. In *Prather v. Dayton Power & Light Co., supra*, we applied *Patterson* retroactively to a pending discriminatory discharge case based on three factors used to determine whether an e exception mandating non-retroactivity exists, as discussed by the Supreme Court in *Chevron Oil Co. v. Huson*, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971). Under these factors, a decision will not be applied retroactively if, first it

> establishes a new principle of law, either by overruling clear past precedent on which litigants have relied ... or by deciding an issue of first impression which resolution was not clearly foreshadowed.

Id. at 106, 92 S.Ct. at 355 (citations omitted). The second retroactivity factor is the "prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." *Id.* at 107, 92 S.Ct. at 355. Finally, the third factor involves weighing "the

inequity imposed by retroactive application" to avoid "injustice or hardship." *Id.* at 107, 92 S.Ct. at 355.

Weighing these factors, the *Prather* court held that applying *Patterson* retroactively would not "retard its operation," nor would it produce "substantial inequitable results" that might otherwise be avoided and concluded that applying *Patterson* would not unduly prejudice the plaintiff. *Prather*, 918 F.2d at 1258. This decision was reaffirmed in *Hull v. Cuyahoga Valley Bd. of Educ.*, *supra*. The district court correctly found that *Patterson* applied retroactively to the pending § 1981 claims of Rivers and Davison.

III

Appellants argue that, even if *Patterson* is applied retroactively to their case, their claims still survive *Patterson* and the district court wrongly dismissed the claim as a discriminatory discharge complaint not recognized under § 1981. We agree.

Appellants contend that *Patterson* only eliminates those claims of retaliation for exercising rights that are unrelated to the specific § 1981 right to "make and enforce contracts." But, they argue, *Patterson* does not eliminate a cause of action for exercising rights that do relate to the enforcement of contract rights. Appellants maintain that they are not making discriminatory discharge claims, but rather are claiming retaliatory discharge that punished them for enforcing their contract right to receive notice equal to that received by whites.

Roadway counters that Rivers and Davison were not punished for enforcing their contract rights as

> The right to enforce contracts does not however extend beyond conduct by an employer which impairs an employee's ability to enforce through legal process

his or her established contract rights.

Patterson, 491 U.S. at 177-78, 109 S.Ct. at 2373.

However, the prohibited conduct of impairing the ability to enforce contract rights is exactly what appellants are complaining about here. Rivers and Davison were punished, they contend, for trying to utilize the established legal process for their grievances. The fact that Roadway allowed formal "access" to legal process does not imply that it could never be impairing the employee's "ability to enforce through legal process." An employer's intimidation and punishment conducted inside formal legal process may impair an employee's contract rights just as much as intimidation and punishment conducted outside formal legal process. *See Carter v. South Central Bell*, 912 F.2d 832, 840 (5th Cir. 1990), *cert. denied*, __ U.S. __, 111 S.Ct. 2916, 115 L.Ed.2d 1079 (1991) (court emphasized that the alleged conduct must have impaired the plaintiff's ability to enforce contractual rights either through court or otherwise on the basis of race).

Appellants' claims are similar to those in *Von Zuckerstein v. Argonne National Lab.*, 760 F.Supp. 1310, 1318 (N.D. Ill. 1991), where plaintiffs were permitted to proceed to trial on their § 1981 claims that "defendants specifically retaliated against them for pursuing (or intending to pursue) their *contract claims* in the internal grievance forum." *Id.* at 1318 (emphasis in original). We do not agree with appellee's argument that *Von Zuckerstein* is distinguishable because it involved an employer who impaired or impeded the plaintiffs from using the available legal process to enforce a specific anti-discrimination contract right. However, § 1981 speaks of the right to "enforce contracts," which includes any contract rights, not just anti-discrimination contract rights. The key here is that plaintiffs were impaired from enforcing contract rights, not the kind of contract right they were impaired from enforcing. Just

because Rivers and Davison were allowed to use the available legal process does not mean the employer did not discriminate against them through retaliation for the very act of using that legal process. Retaliation is defined more broadly than mere access to legal process. *McKnight v. General Motors Corp.*, 908 F.2d 104, 111 (7th Cir. 1990), *cert. denied*, __ U.S. __, 111 S.Ct. 1306, 113 L.Ed.2d 241 (1991), held that retaliation "is a common method of deterrence." We hold that appellants have articulated this essential element of § 1981, that their ability to enforce claimed contract rights was impaired because of their race.

Roadway argues that even if retaliatory discharge did occur, the plaintiffs never alleged retaliatory discharge in either their first or amended complaints. However, upon examination of the record, we find that sufficient allegations exist to form the basis of a retaliatory discharge claim. While appellants admit that their pre-*Patterson* complaint was not specifically structured as a "right to enforce a contract" claim as opposed to a "condition of employment" claim, the very basis of their complaint has always stemmed from retaliatory discharge. They allege, in their amended complaint, that "Rivers'[sic] and Davison's discharges were taken without just cause. More particularly Roadway scheduled a hearing for them for September 26, 1986, based on conduct for which a grievance committee had previously exonerated them with backpay." We find that the appellants' claims fall within the *Patterson* definition of permissible § 1981 actions, as the claims involve discrimination in the right to enforce a contract. We hold that the district court wrongly dismissed appellants' § 1981 claims and the case should be remanded for further proceedings on the § 1981 claims.

IV

Our holding that the case should be remanded for further proceedings on appellants' § 1981 claims raises

potential collateral estoppel problems. The district court has already had a bench trial on the appellants' Title VII claims, finding that Rivers and Davison were not discharged from employment based on their race.

A similar situation existed in *Lytle v. Household Mfg., Inc.*, 494 U.S. 545, 110 S.Ct. 1331, 108 L.Ed.2d 504 (1990), where Lytle, a Black mechanist for a subsidiary of Household Manufacturing, was dismissed for unexcused absences. Lytle filed a complaint with the EEOC, alleging that he had been treated differently than white employees who missed work. He then brought discriminatory discharge and retaliation claims under § 1981 and Title VII. The district court dismissed Lytle's § 1981 claims, concluding that Title VII provided the exclusive remedy for his racial discharge and retaliation claims. At a bench trial on the Title VII claims, the district court dismissed Lytle's discriminatory discharge claims pursuant to Rule 41(b), Fed. R.Civ.P., and granted defendants summary judgment on the retaliation claim.

The Fourth Circuit affirmed, ruling that the district court's findings with respect to Title VII claims collaterally estopped Lytle for litigating his § 1981 claims because the elements of a cause of action under § 1981 are identical to those under Title VII. *Lytle*, 494 U.S. at 549, 110 S.Ct. at 1335; *see also Washington v. Brown & Williamson Tobacco Corp.*, 756 F.Supp. 1547, 1555 (M.D. Ga. 1991). The Supreme Court reversed, based on plaintiff's seventh amendment right to trial by jury in "suits at common law," noting that:

> When legal and equitable claims are joined in the same action, "the right to jury trial on the legal claim, including all issues common to both claims, remains intact."

Lytle, 494 U.S. at 550, 110 S.Ct. at 1335 (citations omitted).

The Supreme Court distinguished the *Lytle* situation, where the equitable and legal claims were brought together, from the situation in *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 99 S.Ct. 645, 58 L.Ed.2d 552 (1979), where the Supreme Court held that "an equitable determination can have collateral-estoppel effect in *subsequent* legal action and that this estoppel does not violate the Seventh Amendment." *Lytle*, 494 U.S. at 550-51, 110 S.Ct. at 1336 (citing *Parklane Hosiery Co.*, 439 U.S. at 335, 99 S.Ct. at 653 (emphasis added).

We find that our situation falls squarely under the *Lytle* precedent and that collateral estoppel does not preclude relitigation of issues decided by the district court in its bench trial resolution of the equitable claims of Rivers and Davison under Title VII. As in *Lytle*, the purposes served by collateral estoppel do not justify applying the doctrine in this case. *Id.* 494 U.S. at 553, 110 S.Ct. at 1337. Collateral estoppel is designed to protect parties from multiple lawsuits and potentially inconsistent decisions, as well as to conserve judicial resources. *Ibid.* Although remanding for further proceedings certainly will expend greater judicial resources, such litigation is essential in preserving Rivers's and Davison's seventh amendment rights to a jury trail.

V

While this case was pending on appeal, the United States Congress passed the Civil Rights Act of 1991. Appellants now argue that the district court should also be reversed in light of the 1991 Act, which amends § 1981 to change the result in *Patterson*. The 1991 Act states that:

> For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and

conditions of the contractual relationship.

Pub.L. 102-166, § 101(b); 42 U.S.C. § 1981(b).

Both this Circuit and the Eighth Circuit have addressed whether this act should apply retroactively to § 1981 claims that were pending on appeal at the time of enactment. Both circuits have ruled that CRA of 1991 does not apply retroactively. *Fray v. Omaha World Herald Co.*, 960 F.2d 1370 (8th Cir. 1992); *Vogel v. City of Cincinnati*, 959 F.2d 594 (6th Cir. 1992); *Mozee v. American commercial Marine Service Co.*, 963 F.2d 929 (7th Cir. 1992).

Both Vogel and Fray examine the history of judicial treatment of retroactivity as applied to new legislation. Building upon both Roman civil law and English common law, up to 1969 it was a well-established principle in American jurisprudence that legislation must be applied only prospectively unless the legislature specifically decreed a retroactive application. *Fray*, 960 f.2d at 1374. However, in *Thorpe v. Housing Auth. of Durham*, 393 U.S. 268, 89 S.Ct. 518, 21 L.Ed.2d 474 (1969), and in *Bradley v. Richmond School Bd.*, 416 U.S. 696, 94 S.Ct. 2006, 40 L.Ed.2d 476 (1974), the Supreme Court held that a new statute must be retroactively applied to a case that was pending on appeal at enactment "unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary." *Bradley*, 416 U.S. at 711, 94 S.Ct. at 2016.

Later, in *Brown v. Georgetown University Hospital*, 488 U.S. 204, 109 S.Ct. 468, 102 L.Ed.2d 493 (1988), the Supreme Court reiterated the principle that "[r]etroactivity is not favored in the law. Thus, congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires the result." *Id.*, at 208, 109 S.Ct. at 471. While the Supreme Court acknowledged this tension in the case law in *Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 494 U.S. 827, 110

S.Ct. 1570, 108 L.ed.2d 842 (1990), the court did not have to resolve the issue, as congressional intent as found to be clear in that case.

Given these conflicting rules of construction, both the *Vogel* and *Fray* courts examined the language and legislative history of the CRA of 1991 and concluded that it should not be applied retroactively. for example, § 402 of Pub.L. 102-166 states that "[e]xcept as otherwise provided, this Act and the Amendments made by this Act shall take effect upon enactment." While appellants argue that this indicates retroactivity, the *Vogel* court correctly noted that this language could mean that the Act applies to pending cases or it could mean it should be applied only to conduct occurring as of that date of enactment. *Vogel*, 959 F.2d at 597-98.

Both the *Vogel* and *Fray* courts also agree that the legislative history sheds little light on the matter, as Senators expressed conflicting views and no legislative committee reports exist explaining the bill. *Fray*, 960 F.2d at 1376-77. Appellants argue that retroactivity is implied because two sections are expressly made prospective. However, the *Fray* court notes that a bill that specifically changes the result in *Patterson* retroactively was vetoed by the President in 1990 and Congress failed to override the veto. The court concluded that:

> We think a rather clear picture emerges from this review of the Act and its legislative history. Proponents of retroactively overruling *Patterson* commanded a majority in both houses of Congress, but they could not override the President's veto of a 1990 bill that contained express retroactive provisions. Thus, proponents could do not better than send an ambiguous law to the judiciary. On the other hand, opponents of retroactivity who favored enactment of a prospective law (including the

> President) were also willing to hand this controversial issue to the judiciary by passing a law that contained no general resolution of the retroactivity issue. However, when a congressional majority could be marshalled, retroactivity opponents "hedged their bets" by expressly making specific provisions, such as § 109, prospective only.

Fray, 960 F.2d at 1377.

Given the ambiguous legislative history and language of the act, this court held in *Vogel* that:

> *Bradley* should be read narrowly and should not be applied in contexts where "substantive rights and liabilities" broadly construed, would be affected. Clearly, retroactive application of the 1991 Act would affect "substantive rights and liabilities" of the parties to this action.

Vogel, 959 F.2d at 598, citing *United States v. Murphy*, 937 F.2d 1032, 1037-38 (6th Cir. 1991).

Appellants argue that *Vogel* is not determinative here since it deals with § 108, which is written differently from § 101, the section at issue here. They also argue that the *Fray* opinion, which does deal specifically with § 101, is wrong. However, appellants' arguments are not well taken on either count. Their distinction between § 101 and § 108 is immaterial, as both *Fray* and *Vogel* examined the retroactivity of the 1991 CRA as a whole, not in terms of specific sections, and both courts concluded that applying the Act retroactively would adversely affect substantive rights and liabilities.

We agree with the *Fray* and *Vogel* decisions and hold that the 1991 CRA does not apply retroactively. However, as we also find that the district court misapplied *Patterson*,

the case can be reversed on those substantive grounds alone. We REVERSE and REMAND for further proceedings under § 1981, as we hold that *Patterson* does not exclude § 1981 claims based on retaliation for attempting to enforce contract rights.

SILVER, Circuit Judge, concurring in part and dissenting in part.

I concur with the majority opinion in full, except that which is listed in part III. It is my opinion that *Patterson v. McLean Credit Union*, 491 U.S. 164, 109 S.Ct. 2363, 105 L.Ed.2d 132 (1989), does not permit a claim for retaliation pursuant to 42 U.S.C. § 1981 under the facts of this case. It may be that *Patterson'* precludes *any* retaliatory claims under § 1981, but this court need not go that far.

First, I have much more of a problem than the majority in determining whether the plaintiffs ever alleged retaliatory discharge in either their first or amended complaints. However, for purposes of this analysis, I will assume that they did.

The majority relies upon the decisions in *McKnight v. General Motors Corp.*, 908 F.2d 104 (7th Cir. 1990), *cert. denied*, __ U.S. __, 111 S.Ct. 1306, 113 L.Ed.2d 241 (1991); and *Von Zuckerstein v. Argonne Nat'l Lab.*, 760 F.Supp. 1310 (N.D. Ill. 1991). However, *McKnight* did not hold that § 1981 allows a claim for retaliation. Instead, it *assumed* that it was so actionable "provided that the retaliation had racial motivation." *McKnight*, 908 F.2d at 111. Then, the court went on to find that the plaintiff in that case "*might* be guilty of violating section 1981. *Id.* at 112 (emphasis added). It further stated that the question need not be pursued, "because General Motors did not interfere with *contractual* entitlements." *Id.*

Moreover, the court in *Von Zuckerstein* held at

1319 that the plaintiffs in that case would have to establish "that they sought to use the internal grievance procedure to vindicate their contractual right to be free from discrimination." That is unlike the present case, which apparently does not have an antidiscrimination provision in the collective bargaining agreement.

Instead, I would follow the decision in *Carter v. South Cent. Bell*, 912 F.2d 832, 840 (5th Cir. 1990), *cert. denied*, _ U.S. __ 111 S.Ct. 2916, 115 L.Ed.2d 1079 (1991), which held that § 1981 no longer extends to retaliatory termination. Although that case is somewhat different from this one, in that the plaintiff asserted that he was retaliated against because of filing a charge with the EEOC, which was a statutory right, not a contractual right, nevertheless, the court stated:

> Were we to hold that section 1981 still encompasses retaliatory discharge, we would be encouraging litigation to determine what the employer's subjective motive was when he fired the employee: was it to retaliate or "merely" to discriminate? This would be pointless. Both motives are equally invidious, and the employee suffers the same harm. Because section 1981 no longer covers retaliatory termination, all suits for discriminatory dismissal must be brought under Title VII.

Id. at 840-841. *Accord Overby v. Chevron USA, Inc.*, 884 F.2d 470, 472-473 (9th Cir. 1989), cited with approval in *Hull v. Cuyahoga Valley Joint Vocational School Dist. Bd. of Educ.*, 926 F.2d 505, 509 (6th Cir.), *cert. denied*, __ U.S. __, 111 S.Ct. 2917, 115 L.Ed.2d 1080 (1991), for the proposition that retaliatory discharge claim is conduct not cognizable under § 1981.

Moreover, this court has, by unpublished decisions, followed that rule from *Carter*. Although they have no

precedential value, see Sixth Cir. R. 24(c), they were cited by Roadway Express in its brief. I am not inclined to completely ignore opinions of other judges on this court, even if they are not binding. In *Christian v. Beacon Journal Publishing Co.*, No. 89-3822, 1990 WL 98844, 1990 U.S. App. LEXIS 12080 (6th Cir. July 17, 1990)[908 F.2d 972 (table)] (unreported), the court held that claims of retaliatory discharge may not be brought pursuant to § 1981 under *Patterson*, citing *Singleton v. Kellogg Co.*, No. 89-1073, 1989 WL 143565, 1989 U.S. App. LEXIS 17920 (6th Cir. Nov. 29, 1989)[890 F.2d 417 (table)] (*per curiam*)(unreported). *See also Bohanan v. United Parcel Serv.*, No. 90-3155, 1990 WL 177208, 1990 U.S. App. LEXIS 20154 (6th Cir. Nor. 14, 1990)[918 F.2d 178 (table)] (unreported)(Wellford, Jr., concurring). Therefore, I would affirm the district court in all respects.

Supreme Court, U.S.
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No. 97-066

In the Supreme Court of the United States

October Term, 1996

Maurice Rivers
and
Robert C. Davison,
Petitioners,

vs.

Roadway Express, Inc.,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JOHN THOMAS LANDWEHR *Counsel of Record*
Robert J. Gilmer
Thomas J. Gibney
Mararet A. Mattimoe
Eastman & Smith Ltd.
One Seagate, 24th Floor
Box 10032
Toledo, OH 43699-0032
Telephone: 419-241-6000
Telecopier: 419-247-1777
Attorneys for Respondent
Roadway Express, Inc.

THE GATES LEGAL PUBLISHING CO. CLEVELAND, OHIO 216-621-5647

QUESTIONS PRESENTED

1. Should the Court reverse its decision in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) and create an inflexible evidentiary framework of establishing a prima facie case in all discharge claims brought pursuant to the various anti-discrimination statutes?

2. In an action brought pursuant to 42 U.S.C. §1981 claiming retaliation as a result of an exercise of a contract right, must a plaintiff identify the contract right exercised in response to a defendant's motion for summary judgment?

LIST OF PARTIES

Respondent Roadway Express, Inc. is a Delaware Corporation. There are no parent or nonwholly owned subsidiary companies to be listed pursuant to Rule 29.6.

The parties are the petitioners, Maurice Rivers and Robert C. Davison ("Rivers" and "Davison" respectively when referred to individually, and "Petitioners" when Rivers and Davison are referred to jointly), and the respondent Roadway Express, Inc. ("Roadway").

TABLE OF CONTENTS

QUESTIONS PRESENTED i

LIST OF PARTIES ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTIONAL STATEMENT 2

STATUTE INVOLVED 3

STATEMENT OF THE CASE 4

SUMMARY OF ARGUMENT 7

ARGUMENT 9

I. Petitioners' Complaints That The Sixth Circuit Misapplied The *McDonnell Douglas* Formula Do Not Warrant Supreme Court Review. 9

II. The Sixth Circuit Does Not Rigidly Apply The *McDonnell Douglas* Formula So As To Require Evidence Of Comparators In Every Case. 10

III. There Is No Conflict Among The Circuits In The Application Of The *McDonnell Douglas* Formula. 12

IV. This §1981 Action Is An Inappropriate Vehicle For The Supreme Court To Review The *McDonnell Douglas* Formula. 14

V. The Sixth Circuit Did Not "Fundamentally Misinterpret" The Anti-Retaliation Provisions of §1981. 16

VI. The Petition For A Writ Of Certiorari Contains Several Misstatements Of Fact. 19

CONCLUSION 22

TABLE OF AUTHORITIES

Cases

Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) 18

Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986) 18

Conley v. Gibson, 355 U.S. 41 (1957) 17

Crabbs v. Copperweld Tubing Products Co., 114 F.3d 85 (6th Cir. 1997) 11

Ensley-Gaines v. Runyon, 100 F.3d 1220 (6th Cir. 1996) 11

EEOC v. Avery Dennison Corp., 104 F.3d 858 (6th Cir. 1997) 11

Furnco Construction Corp. v. Waters, 438 U.S. 567 (1978) 11, 12

Hishon v. King & Spalding, 467 U.S. 69 (1984) 17

Lewis v. NLRB, 779 F.2d 12 (6th Cir. 1985) ... 19

Monette v. Electronic Data Systems Corp., 90 F.3d 1173 (6th Cir. 1996) 13

McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) ..... *passim*

Mitchell v. Toledo Hospital 964 F.2d 577 (6th Cir. 1992) 11

Patterson v. McLean Credit Union, 491 U.S. 164 (1989) 4, 14

Rivers v. Roadway Express, Inc., 511 U.S. 298 (1994) 4, 14

St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 510-511 (1993) 12

Scheuer v. Rhodes, 416 U.S. 232 (1974) 17

Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981) 7, 12

Woythal v. Tex-Tenn Corp., 112 F.3d 243 (6th Cir.1997) 11

Statutes

28 U.S.C. §1254(1) 2

42 U.S.C. §1981 . . . . . i, 3, 4, 9, 14, 15, 16, 18

42 U.S.C. §1981(a)-(b) 15

42 U.S.C. §2000(e) 4

Civil Rights Act of 1991 . . . . . 4, 8, 14, 15

Rules

Federal Rule of Civil Procedure 56(e) 18

Supreme Court Rule 10 9

Supreme Court Rule 15.2 19

Supreme Court Rule 29.6 ii

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OPINIONS BELOW

All relevant opinions are included in the Appendix to the Petition.

JURISDICTIONAL STATEMENT

Petitioners pray for exercise of this Court's jurisdiction pursuant to 28 U.S.C. §1254(1) which permits review by writ of certiorari before or after rendition of a judgment or decree by a United States Court of Appeals. The Court should decline to exercise its jurisdiction. The Sixth Circuit's decision affirming the District Court's grant of summary judgment does not conflict with the decision of another United States court of appeals on the same important matter, nor does it decide an important federal question in a way that conflicts with relevant decisions of this Court or of a state court of last resort.

STATUTE INVOLVED

This case involves 42 U.S.C. §1981 ("§1981"), which provides, in relevant part:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

STATEMENT OF THE CASE

Petitioners were terminated from Roadway in 1986 under similar circumstances and sued Roadway claiming, *inter alia*, race discrimination under §1981 and under Title VII of the 1964 Civil Rights Act, 42 U.S.C. §2000e, *et seq.* (Petition at 2a.) On January 19, 1990, the district court determined that Petitioners failed to state claims under §1981. (Petition at 39a.) Petitioners' identical claims under Title VII were tried to the district court during a one week trial in the spring of 1990; Petitioners were unable to prove their claims. (Petition at 45a-55a.)

On appeal, the Sixth Circuit determined that Petitioners had sufficiently plead a claim under §1981, as that statute was interpreted by this Court in *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989). (Petition at 63a.) The Sixth Circuit remanded the case for further proceedings under §1981. (Petition at 69a.)

Petitioners successfully petitioned this Court for a writ of certiorari on the issue of the application of the Civil Rights Act of 1991 to this case. The Court held that the 1991 Act did not apply, and remanded the case for further proceedings. *Rivers v. Roadway Express, Inc.*, 511 U.S. 298 (1994).

On remand, the district court granted summary judgment in favor of Roadway, finding that Petitioners failed to establish a prima facie case of retaliation. (Petition at 11a-27a.) Petitioners

appealed the district court's grant of summary judgment to the Sixth Circuit. The Sixth Circuit affirmed the district court, finding that the Petitioners had not established a prima facie case of retaliation and, even if they had, Roadway had stated a legitimate, nondiscriminatory reason for Petitioners' terminations and Petitioners had not demonstrated that reason to be pretext. (Petition at 1a-10a.) Through this Petition, Petitioners seek review of that Sixth Circuit decision.

A brief summary of the facts of this case is warranted. Petitioners failed to attend disciplinary hearings scheduled for them on August 22, 1986. (Petition at 47a-48a.) Both were suspended for two days based on their individual work records. (*Id.*) Both grieved the two day suspensions. (Petition at 48a-49a.) Both argued that they had received insufficient notice of the hearings and, had they received sufficient notice, they would have attended. (Petition at 49a.) Both were awarded two days of back pay. (*Id.*)

Roadway notified Petitioners and the Union that new hearings would proceed within three days after the grievance awards were announced. (*Id.*) Hearings were scheduled for Petitioners and other employees while they were on duty. (*Id.* at 50a-52a.) Petitioners were ordered numerous times to attend their hearings. (*Id.*) Both refused. (*Id.*) Petitioners' hearings took place on September 26, 1986. (*Id.*) Both were terminated for their failure to obey

several direct orders and for their accumulated work records. (Petition at 52a.)

Three white employees were scheduled for hearings at the same time. One of these employees, like Petitioners, refused numerous direct orders to attend a hearing while on the clock and was terminated. (Petition at 51a-52a.) Another complied with orders to attend a hearing and was not terminated. (*Id.*) The third was not at work and on duty when his hearing was scheduled.

SUMMARY OF ARGUMENT

Both the district court and the court of appeals found the following evidentiary framework to be appropriate to establish a prima facie case based upon *McDonnell Douglas* and *Burdine*:[1]

1) plaintiff is a non-white;
2) plaintiff enforced or exercised a specific contract right;
3) plaintiff was subject to an adverse employment action; and
4) there is a causal link between both plaintiff's enforcement or exercise of the contract right and plaintiff's race.

(Petition 3a.)

Petitioners complain that they were found not to have raised a material fact concerning any racial motivation for their discharges and allege that it was solely due to their inability to present evidence of comparables who were treated differently. This is incorrect. The court of appeals specifically found that Petitioners failed not only to present evidence of any comparables but also that they failed to present any direct evidence of a racial motivation for Roadway's actions. (Petition 5a.) Petitioner's premise

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[1]*McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1972); Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981).*

that the Sixth Circuit is in conflict with other circuit courts as it requires proof of comparables is therefore incorrect. Petitioners are similarly incorrect to the extent they argue that *McDonnell Douglas* was not applied or was applied incorrectly.

There is no conflict between the Sixth Circuit and the other circuit courts of appeals in the application of the *McDonnell Douglas* construct. The variances noted by Petitioners are simply a reflection of the variations of facts and proof required in differing situations.

Even if Petitioners' premise was correct, this case involves the interpretation of a statute which requires unique analysis and unique proof, and which, due to the Civil Rights Act of 1991, has become an anachronism. It is not an appropriate vehicle through which to establish precedent regarding establishment of a prima facie case of discriminatory discharge.

Finally, Petitioners contention that they should not be required to identify the contract right upon which they base their claim is plausible in the context of notice pleading and perhaps in response to a motion to dismiss. It is not plausible, however, when faced with a motion for summary judgment as a non-moving party must set forth specific facts showing that there is a genuine issue for trial.

ARGUMENT

I. PETITIONERS' COMPLAINTS THAT THE SIXTH CIRCUIT MISAPPLIED THE *MCDONNELL DOUGLAS* FORMULA DO NOT WARRANT SUPREME COURT REVIEW.

This is not a case deserving this Court's review for a second time. It is now solely a retaliatory discharge claim brought pursuant to 42 U.S.C. §1981 and decided upon a motion for summary judgment. It involves the straight forward application of well established law.

The Sixth Circuit appropriately stated the evidentiary framework described in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), in its opinion granting summary judgment. (Petition at 3a.) Therefore, by definition, the alleged error must either be that the Sixth Circuit misapplied *McDonnell Douglas*, or that this Court should overrule *McDonnell Douglas* and create an inflexible method of establishing a prima facie case of employment discrimination in discharge cases. In the case of the former, this Court rarely grants certiorari to review a properly stated rule of law. Sup. Ct. R. 10. There is no reason to deviate from this practice in this case. In the case of the latter, Roadway submits that *McDonnell Douglas* requires no revision as it provides an appropriately flexible method of analyzing employment discrimination cases.

II. THE SIXTH CIRCUIT DOES NOT RIGIDLY APPLY THE *MCDONNELL DOUGLAS* FORMULA SO AS TO REQUIRE EVIDENCE OF COMPARATORS IN EVERY CASE.

Petitioners contend that the Sixth Circuit's decision in this case is in conflict with decisions in other circuits regarding the application of the *McDonnell Douglas* test, and that the Sixth Circuit rigidly applies the *McDonnell Douglas* formula so that, if a plaintiff has no comparators he or she cannot set forth a case of discrimination. (Petition at 14.) This is simply not the case.

First, the court in this case did not require evidence of comparables for Petitioners to make a prima facie case. As specifically stated by the Sixth Circuit: "Plaintiffs presented no evidence of any comparables that could possibly raise an inference of racial motivation in the alleged retaliation, ***and*** they failed to present any direct evidence of a racial motivation for defendant's actions." (Petition at 5a.)

In addition, a brief review of recent case law in the Sixth Circuit shows that, like other circuits, the Sixth Circuit follows this Court's mandate in *Furnco Construction Corp. v. Waters*, 438 U.S. 567 (1978), and applies the *McDonnell Douglas* criteria in a flexible manner.[2] A plaintiff can establish a prima facie case of discrimination through the use of a variety of direct or indirect evidence, comparators or statistics. The Sixth Circuit does not demand that a plaintiff meet one rigid test. The conflict between the circuits Petitioners allege does not exist.

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[2]The following cases demonstrate the flexible approach taken by the Sixth Circuit in establishing a prima facie case: *Crabbs v. Copperweld Tubing Products Co.*, 114 F.3d 85, 86 (6th Cir. 1997) (inferences of discrimination can be made in an ADEA discharge case from disparaging remarks where no comparables exist); *Woythal v. Tex-Tenn Corp.*, 112 F.3d 243, 246-247 (6th Cir. 1997) (comparators are not required in an ADEA discharge case where disparaging comments could establish an inference of discrimination); *EEOC v. Avery Dennison Corp.*, 104 F.3d 858, 861 (6th Cir. 1997) (elements of prima facie case are not inflexible in Title VII racial retaliation case); *Ensley-Gaines v. Runyon*, 100 F.3d 1220, 1224 (6th Cir. 1996) (comparables are an "alternative" to "replaced by" in a disparate treatment case, citing *Mitchell v. Toledo Hospital,* 964 F.2d 577, 582 (6th Cir. 1992).

III. THERE IS NO CONFLICT AMONG THE CIRCUITS IN THE APPLICATION OF THE *MCDONNELL DOUGLAS* FORMULA.

Petitioners' argument that the circuit courts are inconsistent in applying the *McDonnell Douglas* construct is without merit.

McDonnell Douglas v. Green established a general framework for establishing a prima facie case of discrimination which, if established, shifts the burden of production to defendants to state legitimate non-discriminatory reasons for its actions. *Texas Dep't of Community Affairs v. Burdine,* 450 U.S. 248 (1981). If such burden is met by the defendant employer, plaintiff must then produce sufficient evidence to allow the finder of fact to reasonably reject the explanation. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 510-511 (1993).

McDonnell Douglas was never intended to provide a rigid, mechanized or ritualistic method of establishing a prima facie case of discrimination. *Furnco Constr. Corp. v. Waters* 438 U.S. 567, 577 (1978). As noted by Justice Powell in *McDonnell Douglas*, "the facts necessarily will vary...and the specifications... of the prima facie proof required from respondent is not necessarily applicable in every respect to differing situations." *McDonnell Douglas*, 411 U.S. at 802 n. 13.

The Sixth Circuit has adopted the approach of varying the proof required depending on the facts. *Monette v. Electronic Data Systems Corp.* 90 F.3d 1173, 1185 n. 11 (6th Cir. 1996). As the numerous cases cited by Petitioners demonstrate, every circuit allows inferences of discrimination based upon varying evidence justifying such an inference. This was precisely the intent of *McDonnell Douglas.*

Discrimination can take a variety of forms. The *McDonnell Douglas* construct, both in its original form and as it has been applied by the Sixth Circuit and the other circuit courts, has the necessary flexibility to remain useful in the variety of discrimination cases.

IV. THIS §1981 ACTION IS AN INAPPROPRIATE VEHICLE FOR THE SUPREME COURT TO REVIEW THE *MCDONNELL DOUGLAS* FORMULA.

This §1981 case is an inappropriate vehicle through which to review the *McDonnell Douglas* framework for several reasons.

First, as this Court has already determined and Petitioners have already conceded, this is not a discharge or dismissal case (Petition 23a) but rather a §1981 claim of retaliation for enforcing contract rights. *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 303 (1994). Unlike Title VII claims, §1981 claims of this nature require both proof of a protected contract right and proof of a racial motive. (Petition at 17a.) The *McDonnell Douglas* test was established in a Title VII hiring case, and only applied to other statutory claims by analogy. (*See McDonnell Douglas*, 411 U.S. 792.) Thus, even if the circuit courts were in conflict with respect to the application of the *McDonnell Douglas* formula in discharge cases, this is not an appropriate vehicle through which to resolve that conflict.

Second, in the wake of *Patterson* and the 1991 Civil Rights Act, it is particularly inappropriate to establish precedent regarding discriminatory discharges and the *McDonnell Douglas* test based upon a §1981 case. The combination of *Patterson* and the 1991 Civil Rights Act has relegated §1981 to a seldom-used statute. In *Patterson*, this Court

narrowed the scope of discriminatory contract actions under §1981 by holding that it does not apply to discrimination in terms, conditions, and termination of employment, but rather only forbids discrimination in the formation of contracts and enforcement of contract rights. *Id.*

The 1991 Civil Rights Act amended Title VII to make compensatory and punitive damages available in claims of intentional discrimination. 42 U.S.C. §1981(a)-(b). Prior to these amendments, a plaintiff could obtain only back pay and equitable relief under Title VII, but could obtain compensatory and punitive damages under §1981. The result of *Patterson* and the 1991 Civil Rights Act has been, practically speaking, the death of §1981 claims. There is simply no reason to bring a claim of discriminatory discharge under §1981 rather than under Title VII as amended by the Civil Rights Act of 1991. Consequently, given that §1981 has become anachronism, it is an inappropriate vehicle through which to establish precedent.

V. THE SIXTH CIRCUIT DID NOT "FUNDAMENTALLY MISINTERPRET" THE ANTI-RETALIATION PROVISIONS OF §1981.

Petitioners state that the "court of appeals held that petitioners' claim under §1981 must fail because they allegedly failed to identify a specific contract provision that they enforced when they successfully grieved the first disciplinary action against them. App. 3a-5a." (Petition at 29.) Petitioners argue that this was an incorrect statement of law, and that the Sixth Circuit misinterpreted the protection provided by §1981 against retaliation for seeking to enforce contractual rights free of discrimination. This is simply incorrect.

The issue raised by Petitioners is governed more by the Federal Rules of Civil Procedure than §1981. This case proceeded for nine years without Petitioners identifying the theory of recovery upon which they were basing their case. (Petition at 23a.) It was not until oral argument on the summary judgment motion granted by the district court on May 25, 1995 that Petitioners for the first time stated that the contractual right that they were enforcing was their contractual right to grieve differences with their employer that arise out of the collective bargaining agreement. As the district court cogently stated (Petition at 23a), and the Sixth Circuit specifically agreed (Petition at 4a):

> This case is now nine years old. Plaintiffs never pleaded nor alleged nor even mentioned in passing this theory of recovery when the case was before the Court initially. It was also not argued before the Sixth Circuit and was not even raised in plaintiffs' opposition to defendant's motion for summary judgment. There comes a time in the life of a case when a litigant must settle on a theory or theories of recovery and stick to it; that is a primary tenet of the notice pleading theory of the Civil Rules. Defendant first received notice of this theory of recovery at oral argument on defendant's motion for summary judgment, nine years after the inception of this case. Defendant would appear entitled to summary judgment on this claim on this basis alone.

(Petition at 23a-24a.)

Petitioners appear to have confused the burdens placed upon non-movants when opposing motions to dismiss and motions for summary judgment. On a motion to dismiss, a court must accept the allegations stated in the complaint as true, *Hishon v. King & Spalding*, 467 U.S. 69 (1984), must view the complaint in a light most favorable to the plaintiffs, *Scheuer v. Rhodes*, 416 U.S. 232 (1974), and may only grant a motion to dismiss if it is demonstrated that the plaintiff can prove no set of facts that would entitle it to relief. *Conley v. Gibson*, 355 U.S. 41 (1957).

Summary judgment, however, may be granted "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Once the moving party has met its burden under Federal Rule of Civil Procedure 56(e), the burden shifts to the non-moving party who "must set forth specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986) (*quoting* Fed. R. Civ. P. 56(e)).

In the instant case, the contractual provision that Petitioners sought to enforce is an essential fact that Petitioners were required to identify in response to a summary judgment motion. They did not do so in written responses to Roadway's summary judgment motion, but during oral argument more than nine years after this case was filed identified several theories with some vacillation. They are now attempting to disguise this failure by arguing that §1981 does not require identification of a specific contract right. That is not the issue that was addressed by the district court or by the Sixth Circuit, and it is not an issue that should be addressed by this Court.

VI. THE PETITION FOR A WRIT OF CERTIORARI CONTAINS SEVERAL MISSTATEMENTS OF FACT.

Pursuant to the Supreme Court Rule 15.2., Respondent is compelled to bring to this Court's attention perceived misstatements of fact contained in Petitioners' Petition. First, Petitioners state that "[i]t is also undisputed that one of the grounds for the successful grievance was that discipline was being carried out in a racially discriminatory fashion." (Petition at 29.) This is not true. The district court ruled that any evidence regarding the committee's reasons for reversing the suspensions was inadmissible. (R. 120, R. 172.)[3] Any evidence

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[3]This ruling was first made by the United States Magistrate (R. 120: Order of Magistrate), and was later affirmed by the district court (R. 172: Memorandum and Order Affirming Magistrate's Order). At trial, a proffer of such evidence was made, but appellants never raised the issue of its admissibility on appeal, and cannot now raise it.

The reasoning for this ruling is that the committee at issue is a quasi-judicial entity whose members are entitled to the same degree of protection against inquiry into their decision-making processes as are arbitrators. *Lewis v. NLRB*, 779 F.2d 12, 13 (6th Cir. 1985) ("the practice of calling a member of a quasi-judicial body to explain or to otherwise embellish its decision is not permitted").

regarding the motivation behind the committee's reversal of appellants' suspensions is inadmissible.

Second, the Petitioners maintain that they were not notified that their failure to attend their hearings could result in their discharge. (Petition at 12.) However, the district court's Findings of Fact issued after its trial on Petitioners' identical Title VII claims specifically include the following:

> 21. On September 26, 1986, Toney informed Davison that Davison should attend the hearing because he had been given a direct order to do so and that Davison could be discharged if he did not attend the hearing....
>
> * * *
>
> 27. After discussing this matter with Toney, Toney informed Rivers that failure to attend the hearing could result in discharge.

(Petition at 50a-51a.) Therefore, Petitioners' statement that they were not notified that failure to attend their hearings could result in discharge is erroneous.

Third, Petitioners argue that Sedelbauer, the white employee who was discharged on the same day as were the Petitioners, was not comparable to Petitioners because he did not attend the

disciplinary hearing at all, while Petitioners did but left before the hearings were concluded. The Sixth Circuit, on the other hand, stated that "[i]t is undisputed that the only white mechanic who received notice of the second disciplinary hearing and who failed to attend was discharged along with Plaintiffs." (Petition at 5a.) The Sixth Circuit further held that Petitioners "were not present during the proceedings." (Petition at 2a.) Petitioners walking into the hearing room and leaving as soon as the hearings began and Sedelbauer's failure to enter the hearing room at all is a distinction without a difference. The Sixth Circuit correctly viewed Petitioners as being in the same situation as was Sedelbauer: they were notified of the hearings and failed to attend. That Petitioners may have arrived at their hearings, but left when they began was clearly inapposite to the Sixth Circuit.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

John Thomas Landwehr *Counsel of Record*
Robert J. Gilmer
Thomas J. Gibney
Margaret A. Mattimoe
One SeaGate, 24th Floor
P.O. Box 10032
Toledo, OH 43699-0032
Telephone: (419) 241-6000
Telecopier: (419) 247-1777
Attorneys for Respondent
Roadway Express, Inc.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

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Petitioners

v.

ROADWAY EXPRESS, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITIONERS' REPLY TO BRIEF OF RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

ERIC SCHNAPPER
UNIVERSITY OF WASHINGTON
SCHOOL OF LAW
1100 N.E. Campus Way
Seattle, WA 98195
(206) 616-3167

ELLIS BOAL
925 Ford Building
Detroit, MI 48226
(313) 962-2770

ELAINE R. JONES
DIRECTOR-COUNSEL

THEODORE M. SHAW
NORMAN J. CHACHKIN
CHARLES STEPHEN RALSTON
(Counsel of Record)
NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC.
99 Hudson Street
Sixteenth Floor
New York, New York 10013
(212) 219-1900

Attorneys for Petitioners

PRESS OF BYRON S. ADAMS ✦ WASHINGTON, D.C. ✦ 1-800-347-8208

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Petitioners wish to respond briefly to a number of points made by the respondent in its brief in opposition to the petition for a writ of certiorari.

1. Respondent makes factual assertions that are based on the district court's findings of fact at the bench trial on petitioners' Title VII claims. This reliance is misplaced, since the issue here is whether the courts below were correct in granting summary judgment on petitioners' claims under 42 U.S.C. § 1981, thereby depriving petitioners of a jury trial to which they were entitled under *Lytle v. Household Mfg., Inc.*, 494 U.S. 545 (1990). Thus, for example, at pages 5-6 of the Brief in Opposition, respondent asserts that petitioners were ordered to attend the hearings on September 26. However, petitioners disputed this, and the district court erred in resolving this factual dispute in

respondent's favor on summary judgment. *See*, the Petition for a Writ of Certiorari, p. 13.

2. At page 19 of the Brief in Opposition, respondent asserts that the petitioners have misrepresented the facts when they state that it is "undisputed that one of the grounds for the successful grievance was that discipline was being carried out in a racially discriminatory fashion." Petition for a Writ of Certiorari, page 29. This statement by petitioners is accurate, however: it is fact that one of the grounds that petitioners asserted during their first, successful grievance, was that discipline was being carried out in a racially discriminatory manner. The grievance committee upheld the grievance (without specifying the particular ground or grounds for its decision). Respondent refers, in footnote 3 on page 19 of the Brief in Opposition, to the bench trial on the Title VII claims. For the reasons stated in paragraph 1. above, this reference is unavailing. At the jury trial on their 1981 claims to which petitioners are entitled, the question of the admissibility of an arbitrator's spontaneous volunteering of the racial reasoning behind the grievance panel's favorable decision will be raised.

3. In footnote 2, page 11, of the Brief in Opposition, the respondent cites four recent decisions of the Sixth Circuit which it claims shows that there is no conflict with other circuits. However, if anything, the cases cited support the need for a grant of certiorari to resolve the question of the appropriate standards for deciding a case of retaliatory discharge:

a. Crabbs v. Copperweld Tubing Products Co., 114 F.3d 85 (6th Cir. 1997) and *Woythal v. Tex-Tenn Corp.*, 112 F.3d 243 (6th Cir. 1997) are two more examples of affirmances by the Sixth Circuit of grants of summary judgment in EEO cases. Thus, they support petitioners' argument, made at pages 24-25 and notes 47 and 48 of the Petition for a Writ of Certiorari, as to why certiorari should be granted. Moreover, neither of the decisions constitutes a holding concerning the issue of comparator evidence, since in neither case, according to the court of appeals, was there *any* evidence in the record of discrimination based on age.

b. EEOC v. Avery Dennison Corp., 104 F.3d 858 (7th Cir. 1997) did not raise the issue of comparators at all, since the issue presented was purely one of retaliation for filing a charge with the Equal Employment Opportunity Commission. Thus, unlike the present case, the issue of race and comparisons with similarly situated white employees was not present.

c. Ensley-Gaines v. Runyon, 100 F.3d 1220 (6th Cir. 1996) is also inapposite, since the claim was discrimination under the Pregnancy Discrimination Act (PDA). The holding of the Sixth Circuit was that the standard for comparisons under the PDA was different from that for race claims under Title VII. In race cases the standard was, as discussed in the Petition for a Writ of Certiorari, that white comparators must be "similarly situated 'in all respects.'" Because of the specific language of the PDA, the comparator need only be "similar in his or her 'ability or inability to work'" as the plaintiff. 100 F.3d at 1226. Thus, once again, this decision supports the arguments made in the Petition for a Writ of Certiorari as to why certiorari should be granted.

4. With regard to the question of what contractual right was sought to be enforced by petitioners and gave rise to their claim under section 1981, it is clear that petitioners were seeking to enforce their right to file a grievance over discipline, including specifically to grieve on the basis that discipline was administered in a racially discriminatory manner. Petitioners won that grievance and were, it is alleged, retaliated against for being successful.

It is also clear that this contractual claim was not identified for the first time in response to the respondent's motion for summary judgment in 1995, but was raised at least as early as the first appeal to the Sixth Circuit in 1992. As the dissent below noted (Appendix to the Petition at p. 8a), the first decision of the court of appeals stated that "Rivers and Davison were punished, they contend, for trying to utilize the established legal process for their grievances." Appendix to the Petition at page 62a; *Harvis v. Roadway Express*, 973 F.2d 490, 494 (6th Cir. 1992).

In addition, it is clear that petitioners sought to enforce contractual rights to be free of racial discrimination, to have proper notice of disciplinary hearings, and to have discipline based only on "just cause." The fact that these rights were not specifically spelled out in black letters in the collective bargaining agreement did not mean that those rights did not exist. Petitioners' claim is that they were established by custom and past practice, and, therefore, were enforceable. *See, e.g.*, ELKOURI AND ELKOURI, *How Arbitration Works*, Chapter 12, "Custom and Past Practice," pp. 437-56 (4th ed., BNA 1985)(discussing past practice); *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 579 (1960)(specific words of contract not dispositive); *Ethyl Corp. v. Steelworkers*, 768 F.2dd 180, 185-86 (7th Cir. 1985)(implied terms in a contract). The meaning of the contract and whether there was a past practice that supported the claim of implied rights would have been for the jury in the section 1981 trial to decide. *Scott v. Anchor Motor Freight*, 496 F.2d 276 (6th Cir. 1974).

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted and the decision of the court below reversed.

Respectfully submitted,

ELAINE R. JONES
DIRECTOR-COUNSEL

THEODORE M. SHAW
NORMAN J. CHACHKIN
CHARLES STEPHEN RALSTON
(Counsel of Record)
NAACP LEGAL DEFENSE &
EDUCATIONAL FUND, INC.
99 Hudson Street
Sixteenth Floor
New York, NY 10013
(212) 219-1900

ERIC SCHNAPPER
UNIVERSITY OF
WASHINGTON
SCHOOL OF LAW
1100 N.E. Campus Way
Seattle, WA 98195
(206) 616-3167

ELLIS BOAL
925 Ford Building
Detroit, MI 48226
(313) 962-2770

Attorneys for Petitioners